United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-7184 & 76-7185

United States Court of Appeals

For the Second Circuit.

B

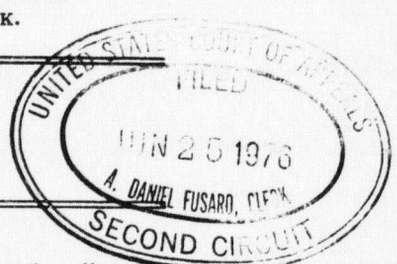
THOMAS J. CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC. and HENRY GIRWOOD,
Defendants-Appellants-Appellees.

Action No. 1.

ANGELA CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC.,
Defendant-Appellant-Appellee,
and
HENRY GIRWOOD,
Defendant.

Action No. 2.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.



APPENDIX.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

THOMAS CHIARELLO,

Plaintiff-Appellee-Appellant,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRDWOOD,

Defendants-Appellants-Appellees.

ANGELA CHIARELLO,

Plaintiff-Appellee-Appellant,

against

DOMENICO BUS SERVICE INC.,

Defendant-Appellant-Appellee,

and

HENRY GIRDWOOD,

Defendant.

DOCKET ENTRIES.

THOMAS CHIARIELLO V. DOMENICO-73 CIV. 2962

DATE	PROCEEDINGS	Date Order Judgment No.
Jul 5-73	Filed Complaint. Issued Summons.	
7-13-73	Filed summons and Marshals return, served: Domenico Bus Service Inc. by Anthony Domenico on 7-9-73 Henry Girwood by Mike Girwood on 7-9-73.	
8/6/73	Filed Defts. Interrogatories to plaintiff.	
8/6/73	Filed Defts."ANSWER" to the complaint.	
Aug.23,73	Filed Notice of Service served on Sec. of State, N.Y., and by certified mail to Deft. Domenico Bus Service.	
Aug. 29, 73	Filed Summons and Marshal's return served on Secretary of State, andAlfred Greco, by Heckerling, 8/16/73	
Sep.13,73	Filed Summons and issued Marshal's return to Factual Serv. Bur. by Heckerling 8/20/73.	
Sep.24,73	Filed Pltff. Answers to Interrogatories.	
Jan -18-74	Filed pltfs. affdvt. and notice of motion for an order substituting Atty. for pltf. - ret. 1-30-74	
Jan -30-74	Filed answering affdvt. of Morton J. Heckerling, Esq. (for pltf.) re motion to substitute Attorneys.	
Mar -5-74	Filed memo endorsed on pltf's motion to substitute Attorney for pltf: This motion is granted. The substitution of attorneys is granted on condition that pltf. reimburse his present Attorney in the sum of $313.70 for disbursements. In addition said attorney shall has a lien of 20% on any recovery obtained by pltf. So ordered. - Metzner, J. m/n	
Mar-21-74	Filed pltf's cross-notice to take deposition of defendants on 4-11-74	
Order	PRE-TRIAL CONFERENCE HELD BY Metzner, J.	
Dec- 9-74	Filed pltf's notice to take depositions of deft. Domenico Bus Service, Inc. on 12-19-74	
05-07-75	Filed pltf's notice that he will produce Prof. George R. Morrison as an expert witness.	
05-13-75	Filed consent pre-trial order for consolidated action (73 CIV 2956 and 75-1956) Metzner, J.	
05-14-75	Filed stip. and order consolidating 75 CIV 1956 HFW with this proceeding for all purposes - and further ordered that all depositions taken in 73 CIV 2962 are binding for the consolidated action. -- Metzner, J.	
06-2. -75	Filed ANSWER of deft. Domenico Bus Service and Jury demand.	
06-25-75	Filed deft. Domenico's interrog.	
01-07-76	Filed pltf's notice to ~~take~~ move to amend pre-trial order as indicated.	
01-21-76	Filed JUDGMENT AND ORDER that the defendants have judgment against plaintiffs dismissing the complaint. - Clerk.	
01-13-76	JURY TRIAL BEGUN before Metzner, J.	
01-14-76	trial continued	
01-15-76	trial continued	
01-16-76	trial continued and concluded - Verdict for defendant -- Metzner, J.	
01-26-76	Filed plaintiffs affdvt. and notice of motion based on the record for judgment nothwithstanding the verdict in favor of plaintiff and to vacate judgment. (no return date)	
02-02-76	Filed defts' affdvit of John A. Schultz in opposition to pltf's motion for judgment notwithstanding the verdict or vacating the verdict or judgment for the deft. and agranting a new trial. (also docketed in 75 Civ. 1956)	
02-02-76	Filed defts' memorandum of law . (also docketed in 75 Civ. 1956)	
02-13-76	Filed pltts reply affdvt.	
02-13-76	Filed OPINION #43888.. The jury's verdict is predicated on the failure of plaintiffs to show that the bus driver was negligent. This finding is against the evidence and therefore must be set aside. So ordered.- Metzner, J. m/n	

T5

DOCKET ENTRIES

Chiarello v. Domenico Bus Service, Inc. -- page 3 --

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Ord Judgment
02-20-76	Filed pltfs/that he moves to amend pre-trial order as indicated herein.	
02-24-76	Filed defts affdvt. and notice of motion to hold 2nd trial before another District Judge. - ret. 3-11-76	
02-25-76	Filed memo endorsed on above motion: The fact that the court has set aside a verdict as contrary to the evidence is not a legal basis for disqualification. Motion denied. The trial shall proceed as scheduled. Metzner, J. m/n	
02-26-76	Filed deft. Domenico Bus Service objections to pltfs. motion to amend pre-trial order.	
3-2-76	Filed deft. Domenico Bus Service notice to amend the pre-trial order as indicated.	
3-09-76	Filed transcript of testimony (record of proceedings) dated Jan. 13,14,15, 1976 and January 16, 1976	
03-09-76	Filed plaintiffs request to charge (I)	
03-09-76	Filed plaintiffs request to charge (II)	
03-09-76	Filed defendants request to charge.	
03-03-76	JURY TRIAL BEGUN BEFORE METZNER, J. (2nd trial)	
03-04-76	trial continued	
03-05-76	trial continued	
03-08-76	trial continued	
03-09-76	trial continued	
03-10-76	trial continued and concluded. Jury Verdict for Plaintiff. Judgment stayed for 30 days on defts motion and 60 days to make a a case. -- Metzner, J.	
03-15-76	Filed plaintiffs' post trial memorandum.	
3-16-76	Filed defts post-trial memorandum	
3-15-76	Filed Judgment and order #76,222 that defts motion to set aside verdict is denied. Judgment shall be entered in the sum of $669,910 jointly and severally with a stay of execution for thirty days. So ordered, -- Metzner, J. - Judgment entered - Clerk 3-17-76	
4-9-76	Filed defts' Notice of Appeal from judgment entered in this court by Judge Metzner on March 11-76. Notice mailed to plaintiff's attorney Martin Lassoff, Esq., 160 Broadw New York, N.Y. 10038.	
4-9-76	Filed defts undertaking on appeal in the sum of $500,000.00 from judgment of March 11- Insuarance Co. of North America, Philadelphia, Penn; bond no. 28804632.	
4-12-76	Filed pltfs notice of appeal to the USCA for the 2nd Circuit from so muc judgment dtd. 3-11-76 which reduces and discounts the damages for the fu pain and suffering -- copy mailed to Daniel J. Coughlin, Esq.	
5-4-76	Filed defts undertaking on appeal in the sum of $249,613.00 from judgment of March 11- Boston Old Colony Insurance Co.; bond no 206 40 39.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

BEST COPY AVAILABLE

DOCKET ENTRIES

DATE	NR.	ANGELA CHIARELLO V. DOMENICO-75 CIV. 1956
04-24 75	-01-	Filed complaint and issued summons.
05-06-75	-2-	Filed summons and Marshals return - served:
05-21-75	—	Factual Service Bureau Inc., agent by Joel Uydess on 4-30-75 Answer in 73-2962
05-14-75	----	Filed stip. and order consolidating this action with 73 CIV 2962 for all purposes. -- Metzner, J. (placed in 73 CIV 2962)
01-13-76	===	Jury trial begun before Metzner, J.
01-14-76		trial continued
01-15-76		trial continued
01-16-76		trial continued and concluded - Verdict for the deft. -- Metzner, J.
01-21-76	===	Filed JUDGMENT and order that the defendants have judgment against plaintiff dismissing the complaint. -- Metzner, J. (filed in 73-2962)
01-26-76	===	Filed pltfs affdvt. and notice of motion to vacate above judgment and to enter judgment in favor of plaintiff nothwithstanding the verdict (filed in 73 CIV 2962)
02-02-76	———	Filed defts' affdvt. of John A. Schultz in opposition to pltf's motion for judgment notwithstanding the verdict or vacating the verdict or judgment for the deft. and granting a new trial.(filed in 73 Civ. 2962)
02-02-76	———	Filed defts' memorandum of law. (filed in 73 Civ. 2962)
02-13-76	———	Filed plaintiff's reply affdvt. re motion to vacate judgment. (placed in 73 CIV 2962)
02-13-76	———	Filed OPINION #43888...The jury's verdict is predicated on the failure of plaintiffs to show that the bus driver was negligent. This finding is against the weight of the evidence and therefore must be set aside. So ordered. -- Metzner, J. m/n (filed in 73 CIV 2962)
03-03-76		2nd JURY TRIAL BEGUN BEFORE METZNER, J.
03-04-76		trial continued
03-05-76		trial continued
03-08-76		trial continued
03-09-76		trial continued
03-10-76		trial continued and concluded - Jury Verict for plaintiff. Judgment stayed for 30 days on defts motion and 60 days to make a case. -- Metzner, J.
03-15-76	*	Filed plaintiffs' post trial memorandum (filed in 73-2962)
03-15-76	*	Filed Judgment and order #76,223 that deft. Girdwood was never served with process and the action is dismissed as to him. Deft's Domenico Bus Service, Inc.'s motion to set aside verdict is denied. Judgment shall be entered against Domenico Bus Service, Inc. in the sum of $79,703, with a stay of execution for 30 days. So ordered Metzner, J. -- Judgment entered - Clerk 3-17-76.
4-9-76		Filed Defts Domenico Bus Serivce, Inc's notice of appeal from judgment entered in this court by Judge Metzner on March 11-76 . Notice mailed to plaintiff's Attorney Martin Lassoff, Esq., 160 Broadway, New York, N.Y. 10038.
4-9-76		Filed defts undertaking on appeal in the sum of $500,000.00 from judgment entered March 11, 1976 . Insurance Co. of North America, Philadelphi Penn; bond no. 28804632.
04-12-76		Filed pltfs notice of appeal to the USCA for the 2nd Circuit from judgment dtd. 3-11-76 from so much which reduces and discounts the damages for future loss of consortium as found by the jury, etc. copy mailed to Daniel J. Coughlin, Esq.
5-4-76		Filed defts. undertaking on appeal in the sum of $249,613.00 from judgment of Mar 11-76. Boston Old Colony Insurance Co.; bond no. 206 40 39.

DOCKET ENTRIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.C.A. NO. 76-7184

Thomas J. Chiarello et al

CASE NO. 73 Civ 2962
(& 75 Civ 1956)
JUDGE Metzner

-vs-

Domenico Bus Se rvice Inc. et al

EXTRACT OF DOCKET ENTRIES

DATE	PROCEEDINGS
May 24-1976	Filed transcript of record of proceedings dated January 13,14,15 & 16, 1976.
May 24, 1976	Filed transcript of record of proceedings dated March 3,4,5,8,8 &n10, 1976

Complaint (Action No. 1).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRWOOD,

Defendants.

Plaintiff by his attorneys, Standard, Weisberg, Heckerling & Rosow, complaining of the defendants herein, alleges as follows:

FIRST: That at all the dates and times hereinafter mentioned, the plaintiff is and was a citizen of the State of New York and residing at 148 Figurea Avenue, Staten Island, New York.

SECOND: Upon information and belief that at all the dates and times hereinafter mentioned, the defendant, Domenico Bus Service Inc. was and still is a foreign corporation duly organized and existing by virtue of the laws of the State of New Jersey, maintaining its personal office in Bayonne, New Jersey.

THIRD: Upon information and belief that at all the dates and times hereinafter mentioned, the defendant, Domenico Bus Service Inc., was and still is authorized and licensed to transact business in the State of New York and it transacts business in the State of New York, including the transportation of passengers for hire within the City of New York.

FOURTH: Upon information and belief that at all the dates and times hereinafter mentioned, the defendant, Henry Girwood, was and still is a resident of Kearny, New Jersey.

FIFTH: That the jurisdiction of the within action is based upon the diversity of citizenship as between the plaintiff and defendants.

SIXTH: That the matter in controversy herein, exclusive of costs and interest is in excess of the sum of $10,000.

SEVENTH: That at all the dates and times hereinafter mentioned, the defendant, Domenico Bus Service Inc., was the owner of a certain General Motors Bus, bearing license plate No. OXN 242 issued by the Motor Vehicle Department of the State of New Jersey.

EIGHTH: Upon information and belief, that at all the dates and times hereinafter mentioned, the defendant, Henry Girwood, was operating the aforesaid motor vehicle with the knowledge, consent and permission of the defendant, Domenico Bus Service, Inc.

NINTH: Upon information and belief, that at all the dates and times hereinafter mentioned, the said vehicle was controlled by the defendant, Henry Girwood, with the knowledge, consent and permission of the defendant, Domenico Bus Service Inc.

TENTH: That at all the dates and times hereinafter mentioned, the defendant, Henry Girwood, was in the employ of the defendant Domenico Bus Service Inc.

ELEVENTH: That at all the dates and times hereinafter mentioned, the defendant, Henry Girwood, was performing services as a bus driver on behalf of the defendant, Domenico Bus Service Inc.

TWELFTH: That at all the dates and times hereinafter mentioned, the plaintiff was operating a motor vehicle

bearing license No. JR 7207 duly issued by the Motor Vehicle Bureau of the State of New York.

THIRTEENTH: That at all the dates and times hereinafter mentioned, the aforesaid motor vehicles were operated in the vicinity of the New Jersey entrance of the Bayonne Bridge.

FOURTEENTH: That on or about June 30, 1972, without any fault on the part of the plaintiff and by reason of the recklessness, carelessness and negligence of the defendants, their agents, servants and/or employees, the defendants' motor vehicle was caused to run into and strike the rear of the plaintiff's motor vehicle and as a result thereof, the plaintiff was caused to be injured.

FIFTEENTH: That by reason of the premises aforesaid, plaintiff was rendered sick, sore, lame and disabled and sustained severe permanent personal injuries, was required and still is required to undergo medical care and attention and has expended and will in the future expend sums of money in endeavoring to cure himself of his injuries, and has been disabled from performing his usual daily labors and will in the future be disabled from performing his usual daily labors, and has lost sums of money which he otherwise would have earned as wages and has sustained pain and serious personal injuries, all to his damage.

WHEREFORE, plaintiff demands judgment in the sum of Two Million ($2,000,000.00) Dollars, all together with the costs and disbursements of this action.

STANDARD, WEISBERG, HECKERLING & ROSOW
Attorneys for Plaintiff
By: Morton J. Heckerling
A Member of the Firm
Office & P. O. Address
38 Park Row
New York, N. Y. 10038

Answer (Action No. 1).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRWOOD,

Defendants.

73 Civ 2962
Judge Metzner

Defendants, Domenico Bus Service Inc. and Henry Girwood, by Daniel J. Coughlin, their attorney, answering the complaint of the plaintiff, allege:

1. Deny having knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraphs designated "First", "Fifth", "Twelfth".

2. Deny each and every allegation contained in paragraphs designated "Sixth", "Fourteenth", "Fifteenth".

FIRST DEFENSE

3. That any injuries allegedly sustained by the plaintiff were caused, or contributed to, by the negligence and carelessness of the plaintiff.

Answer (Action No. 1)

SECOND DEFENSE

4. That this Court does not have jurisdiction over the persons of the defendants nor over the subject matter in litigation.

THIRD DEFENSE

5. That the complaint does not set forth a cause of action upon which relief may be granted in any Court sitting within the territorial limits of the State of New York.

FOURTH DEFENSE

6. That the venue of this action has been improperly laid in the Federal Court sitting within the limits of the State of New York.

WHEREFORE, defendants Domenico Bus Service Inc., and Henry Girwood, demand judgment dismissing the complaint of the plaintiff, together with costs and disbursements herein.

Dated: New York, New York
August 3, 1973

DANIEL J. COUGHLIN
Attorney for Defendants
Domenico Bus Service and Henry Girwood
Office and P. O. Address
110 William Street
New York, New York 10038

INTERROGATORIES (ACTION NO. 1).

UNITED STATES DISTRICT COURT:SOUTHERN DISTRICT

---------- X

THOMAS J. CHIARIELLO,

Plaintiff,

INTERROGATORIES

- against -

DOMENICO BUS SERVICE INC.
et ano,

Defendants.

---------- X

S I R:

PLEASE TAKE NOTICE that the defendant requires the plaintiff to answer separately and fully, in writing and under oath, the following interrogatories, pursuant to Rule 33 of the Rules of the Civil Practice. These interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorneys obtain further information between the time answers are served and the time of trial.

1. State the plaintiff's full name, age and place of birth.

2. Has he ever been known by any other name and, if so, give the other name or names and state where and when such names were used by him.

3. Has his name ever been legally changed and, if so, state when, where and through what procedure.

4. State the plaintiff's present residence address and the period during which (he) or (she) resided at said address.

5. List all addresses at which the plaintiff resided during the past ten years and the dates of the use of each.

6. Is the plaintiff married? If so,

   a) Give the spouse's full name.
   b) If a female, her maiden name.
   c) His or her address for the five years before marriage.
   d) The date and place of marriage.

INTERROGATORIES (ACTION NO. 1)

e) State whether or not the spouse is living with the plaintiff.
f) If not, when the separation occurred, and
g) The spouse's present address.

7. If the plaintiff was previously married, state for each previous spouse:

a) The name and present residence address of each spouse.
b) The dates of commencement and termination of each marriage.
c) The place where each ceremony was performed.
d) For each marriage, please state the manner
e) If any marriage was terminated by divorce, state for each such divorce the county and state or place where the action was filed and the grounds alleged in said action and by whom filed.

8. For the ten years immediately preceding the date of the incident referred to in the complaint, state:

a) The names and addresses of each of the employers of the plaintiff.
b) The dates of commencement and termination of each such source of employment.
c) Detailed description of the services or work performed for each source of employment.
d) The average weekly wages or earnings from each place of employment.
e) For each employer, whether a physical examination was required, and if so, state the date, place and person giving the physical examination.
f) The name of the immediate boss, foreman or other superior at each of the places of employment listed above.

9. What is the plaintiff's social security number?

10. Has the plaintiff ever drawn social security benefits for disability? If so, state:

a) His residence at the time.
b) The social security office through which the claim was filed.
c) The nature and extent of the disability.
d) The length of time of such disability and the beginning date.

11. Did the plaintiff ever receive any disability pension, income or insurance or any workmen's compensation from any agency, company, person, corporation, state or government? If So, state:

a) The nature of any such payment.
b) Dates such income was received.
c) For what injuries or disability and how such injury occurred or disability arose.
d) By whom paid.
e) Whether or not there was any disability at the time of the incident referred to in the complaint.
f) If so, the nature and extent of such disability.

12. With respect to each of the five years preceding the date of the alleged accident state:

NTERROGATORIES (ACTION NO. 1)

a) His yearly gross income.
b) His yearly net income.
c) The name and address of the person, firm, or corporation having custody of any papers pertaining to his income.

13. Were income tax returns filed with the Director of Internal Revenue for any of the past five years or with any state tax authority or department?
If so, state:

a) The office of the Director of Internal Revenue with which each return was filed.
b) The amount reported in each return as earned income.

c) The years for which filed as to Director of Internal Revenue.
d) The state tax authority or authorities with whom such returns were filed.
e) The years for which filed with such state tax authority or authorities.
f) The amount of tax shown to be due on each return.

14. State the name and address of each school, college, or educational institution the plaintiff attended, listing the dates of attendance and the courses of study.

15. Did the plaintiff ever serve in the Armed Forces or perform services for any branch of any governmental agency? If so, state:

a) The name of each such organization and the particular branch.
b) The dates and places of such services.
c) Serial or identification number.
d) Whether or not a physical exam was required, and if so, the dates and places of such exams.
e) The date of termination of such services.
f) A detailed description of the reason why the services were discontinued.

16. Was the plaintiff ever rejected for military or government service for physical reasons? If so, state:

a) The date thereof.
b) The condition for which rejected.
c) The agency so rejecting.

17. Did the plaintiff ever receive a discharge from military or government service for physical reasons? If so, state:

a) The date thereof.
b) The condition for which discharged.
c) The agency so discharging plaintiff.

18. Did the plaintiff suffer any injuries in any accident either prior or subsequent to the incident referred to in the complaint? If so, state:

a) The date and place of such injury.
b) A detailed description of all the injuries.
c) The names and addresses of any hospitals rendering treatment.

INTERROGATORIES (ACTION NO. 1)

d) The names and addresses of all physicians, surgeons, osteopaths, chiropractors, or other medical practitioners rendering treatment.
e) If compensation was made in any manner for any such injury, state the names and addresses of each and every person or organization paying such compensation and the amount thereof.

19. Has the plaintiff ever had any serious illness, sickness, disease, or surgical operations, either prior or subsequent to the incident referred to in the complaint? If so, state:

a) The date and place.
b) A detailed description of symptoms.
c) The names and addresses of any hospitals rendering treatment.
d) The names and addresses of all physicians, surgeons, osteopaths, chiropractors, or medical practitioners rendering treatment.
e) The approximate date of recovery.
f) If there was incomplete recovery, the date the condition became stationary and a description of the condition at that time.

20. Was the plaintiff ever turned down or rated by any company for accident, health, or life insurance? If so, state:

a) The name and address of such company or companies.
b) The date thereof.
c) The reason therefor.

21. Has the plaintiff ever entered or been committed to any institution, either public or private, for the treatment or observation of mental conditions, alcoholism, narcotic addiction, or disorders of any kind? If so, state:

a) The name and address of such institution.
b) The length of stay and the dates thereof.
c) The purpose or reason for entry into such institution.
d) The name and address of the doctor who treated the plaintiff for such condition.

22. State whether you have made any statement or statements in any form to any person regarding any of the events or happenings referred to in your complaint. If so, state:

a) The name and address of the person or persons to whom such statements were made.
b) The date such statements were made.
c) The form of the statement, whether written, oral, by recording device or to a stenographer.
d) Whether such statements, if written, were signed.
e) The names and addresses of the persons presently having custody of such statements.

23. State the full name and last known address, giving the street number, city and state of every witness known to you or to your attorneys who has any knowledge regarding the facts and circumstances surrounding the happening of the incident referred to in the complaint or your alleged injuries including, but not being limited to, eyewitnesses to such event, as well as medical witnesses and other persons having any knowledge thereof.

INTERROGATORIES (ACTION NO. 1)

24. If any of the witnesses listed above or whom you propose to use at the trial are related to you or to each other, please state the nature of such relationship.

25. State the full name and last known address, giving the street, state number, city and state, of every witness known to you or to your attorneys who claims to have seen or heard the defendant make any statement or statements pertaining to any of the events or happenings alleged in your complaint.

26. Supply the following information with respect to each individual whose name you have given in the answer to the preceding interrogatory:

a) The location or locations where the defendant made any such statement or statements.
b) The name and address of the person or persons in whose presence the defendant made any such statement, statements.
c) The time and date upon which the defendant made any such statement or statements.
d) The full name and address of any other person who was present at the time and place the defendant made such statement or statements
e) Whether you or anyone acting on your behalf obtained statements in any form from any persons who claim to be able to testify to the statements or statements made by the defendant.

27. If the answer to paragraph (e) above is in the affirmative, then state:

a) The names and addresses of the persons from whom any such statements were taken.
b) The date upon which said statements were taken.
c) The names and addresses of the persons and employers of such persons who took such statements.
d) The names and addresses of the persons having custody of such statements.
e) Whether such statements were written, oral, recording device or by court reporter or stenographer.

28. State whether you, your attorney, or anyone acting on your or their behalf obtained statements in any form from any persons regarding any of the events or happenings that occurred at the scene of the incident referred to in the complaint immediately before, at the time of, or immediately after said incident. If so, state:

a) The name and address of the person from whom any such statement were taken.
b) The dates on which such statements were taken.
c) The names and addresses of the persons and employers of such persons who took such statements.
d) The names and addresses of the persons having custody of such statements.
e) Whether such statements were written by recording device, by court reporter or stenographer.

29. State the names and addresses of any and all proposed expert witnesses, and the technical field in which you claim they are an expert.

INTERROGATORIES (ACTION NO. 1)

30. Do you intend to rely upon any medical text in your cross-examination of this defendant's medical experts? If so, state:

a) The exact title of each medical text upon which you intend to rely.
b) The name and address of the publisher of each such medical text.
c) The date upon which each such medical text was published.
d) The name of the author of each such medical text.

31. Please state in detail the nature of the injury or injuries allegedly sustained by the plaintiff as a result of the incident referred to in the complaint.

32. With respect to the injuries allegedly suffered, state:

a) The extent and nature of any disability.
b) Describe in detail the location of any pain suffered and the duration and intensity of such pain.
c) Whether or not the plaintiff suffered any restraint of his normal activities due to the injuries allegedly suffered, and describe in detail the nature of such restraint and the dates plaintiff suffered the pain.

33. If any treatment was given with respect to the injuries allegedly suffered, state:

a) The name and of each hospital at which treated or admitted.
b) The dates on which said treatment was rendered, including the dates of entry and discharge into and from said hospital or hospitals.
c) Itemize the charges rendered by each of the hospitals listed above.
d) State the name and address of each doctor or medical practitioner of any type whatsoever who had examined or treated the plaintiff with respect to the injuries alleged.
e) Itemize the cost and expenses of such examinations or treatments by the doctors listed above.

34. State the treatment, or procedures or operations that have been performed in connection with the alleged injuries at any hospital and give the name of the hospital and the name of the doctor or doctors giving the treatment or performing the procedures and the dates upon which they were given or performed.

35. Since the date of the incident referred to in the complaint, was the plaintiff treated or examined by any other doctor or medical practitioner of any type whatsoever whose name you have not heretofore supplied. If so, state:

a) The name and address of each doctor or medical practitioner of any type whatsoever who examined, treated, conferred, or consulted with the plaintiff and the dates of the same.
b) The condition for which said care or treatment or attention was rendered.

INTERROGATORIES (ACTION NO. 1)

36. If the plaintiff has incurred any medical bills in connection with the alleged injuries not heretofore listed, please state:

a) The total amount of each such bill.
b) The person to whom such amount was paid.
c) The service or thing for which the bill was rendered.

37. Did or does the plaintiff wear any type of orthopedic appliance? If so, state:

a) The name of the doctor who fitted or prescribed said appliance.
b) Describe the appliance and state its cost.
c) When did he start wearing said appliance.
d) When did he stop wearing said appliance.
e) Was said appliance worn constantly or intermittently during the foregoing period, and if both, state the period in which it was worn constantly.

38. Has the plaintiff ever been involved in any other legal action, either as a defendant or as a plaintiff? If so, state:

a) The date and place each such action was filed, giving the name of the court, the name of the other party or parties involves, the number of such actions and the names of the attorneys representing each party.
b) A description of the nature of each such action,
c) The result of each such action, whether or not there was an appeal and the result of the appeal and whether or not such case was reported and the name, volume number and page citation of such report.

39. Has the plaintiff sustained any additional financial expenses as a result of the incident complained of, other than those covered by preceding interrogatories? If so, state:

a) The nature and amount of such expense.
b) The date thereof.
c) The names and address of any persons to whom any money so claimed as an additional expense was paid.

40. State in detail the acts or omissions which sonstituted the negligence of the defendant, its agents, servants and/or employees as alleged in the complaint.

41. Set forth whether there was actual or constructive notice.

42. Has the plaintiff ever pleaded guilty to or been convicted of any crime other than traffic violations? If so, please state:

a) The nature of the offense.
b) The date.
c) The county and state in which plaintiff was tried.
d) The sentence given plaintiff.

43. Has the plaintiff ever entered or been committed to any institution,

either public or private, for the treatment or observation of mental conditions, alcoholism, narcotic addiction, or disorders of any kind? If so, state:

a) The name and address of such institution.
b) The length of plaintiff's stay and the dates thereof.
c) The purpose or reason for plaintiff's entry into such institution.
d) The name and address of the doctor who treated the plaintiff for such condition.

44. Please list all violations of the motor vehicle or traffic laws or ordinances to which the plaintiff has pleaded guilty or nolo contendere and to which the plaintiff has been found guilty, the date of such offense, the court in which the case was heard and the nature of the violation charged.

45. At the time of the incident referred to in the complaint, did the plaintiff have a valid license to operate a motor vehicle? If so, state:

a) The state issuing it.
b) The expiration date.
c) The number of such license.
d) Whether there were any restrictions on said license and if so, the nature of the restrictions.

46. Has the plaintiff ever had a license to operate a motor vehicle suspended or revoked? If so, state:

a) When and where it was suspended or revoked.
b) The period of such suspension or revocation.
c) The reasons for such suspension or revocation.
d) Was such suspension or revocation lifted?

47. State the purpose of the automobile trip the plaintiff was on at the time of the incident referred to in the complaint.

48. State the exact destination.

49. State the time and point of departure.

50. State the time and place of all stops and departures between the commencement of the trip and the time of the incident referred to in the complaint.

51. If the plaintiff was a passenger, state:

a) Whether or not (he) or (she) was paying any of the expenses of the trip.
b) Whether or not plaintiff owned any interest, direct or indirect, in the vehicle.
c) Whether or not the plaintiff decided or controlled the route taken.

52. State whether there was any contract agreement or understanding between the plaintiff and the driver and/or the owner of the vehicle in which the plaintiff was riding at the time of the incident referred to in the complaint,

as to compensation for permission to ride in said vehicle, sharing expenses thereof, control of the vehicle or an arrangement for pooling the respective vehicles for joint use or otherwise.

53. Give the name and address of the owner of the vehicle in which the plaintiff was riding at the time of the incident referred to in the complaint.

54. Describe the weather conditions at the time of the incident referred to in the complaint.

55. State whether the roadway was wet or dry.

56. Describe the visibility at the time, i.e., good, good, fair or poor.

57. State whether or not the plaintiff was familiar with the scene of the incident referred to in the complaint prior thereto.

58. State in detail the manner in which you assert that the incident referred to in the complaint occurred, specifying the speed, position, direction, and location of each vehicle involved during its approach to, at the time of and immediately after the collision.

59. Did the plaintiff consume any alcoholic beverage of any type, or any sedative, tranquilizer or other drug, medicine or pill during the 48 hours immediately preceding the incident referred to in the complaint? If so, state:

a) The nature, amount and type of item consumed.
b) The amount of time over which consumed.
c) The names and addresses of any and all persons who have any knowledge as the consumption of these items.

60. State whether or not the vehicle in which the plaintiff was riding was repaired? If so, state:

a) The date thereof.
b) The name and address of the person or corporation making such repairs.
c) The nature of such repairs.
d) The cost of such repairs.
e) If written records or memoranda were made of such repairs, state where, when and the names and addresses of the person making such records or memoranda, the present whereabouts of the memoranda, and the name and address of the person in possession or custody of such records or memoranda.

61. If the vehicle was not repaired, state whether or not an estimate of the necessary repairs was made. If so, state:

a) The name and address of the person making such estimate.
b) If it was written, the name and address of any person having custody of a copy thereof.

62. Does the plaintiff, his attorney, insurance carrier or anyone acting on his or their behalf, have or know of any photographs, motion pictures,

maps, drawings, diagrams, measurements, surveys or other descriptions concerning the events and happenings alleged in the complaint, the scene of the accident, or the areas or persons or vehicles involved made either before, after or at the time of the events in question, including any photographs made of the plaintiff at any time since the incident referred to in the complaint and if so, as to each such item, state:

a) Its nature.
b) Its specific subject matter.
c) The date it was made or taken.
d) The name and last known address of the person making or taking it.
e) What each such item purports to show or illustrate or represent.
f) The name and address of the person having custody of such item.

63. If the plaintiff is still receiving medical services or treatment of any nature whatsoever, state:

a) The name or names of the person or persons attending him.
b) The approximate frequency of said treatment or service.
c) The date plaintiff last received said treatment or service.

64. State the dates during which the plaintiff was confined following his discharge from the hospital.

65. At the time of the incident referred to in the complaint, did the plaintiff have any condition for which he wore eye glasses or for which eye glasses had been prescribed and if so, state

a) A brief description of the condition.
b) Was the plaintiff wearing glasses at the time in question?
c) The name and address of the doctor or person who prescribed eye glasses for the plaintiff.

66. Please list all medicine purchased or used by the plaintiff in connection with the treatment of the injuries complained of, the cost thereof, and the store from which purchased.

67. Was the plaintiff charged with any violation of law arising out of the incident referred to in the complaint, and if so, state

a) The plea entered by the plaintiff to such charge.
b) The court in which the charge was heard.
c) The nature of the charge.
d) Whether or not the testimony at any trial on said charge was taken down or recorded in any manner whatsoever.

INTERROGATORIES (ACTION NO. 1)

68. If such testimony was taken down or recorded, state by whom it was recorded and whether a transcript has been made of such recording.

a) If a transcript has been made state who has possession of the transcript at this time.
b) If there was a hearing or trial on any such charge, please state:

(1) The date of the hearing or trial.
(2) The names and addresses of person or persons who were subpoenaed or who appeared as witnesses.

Dated: New York, New York

August 3, 1973

DANIEL J. COUGHLIN
Attorney for Defendants
DOMENICO BUS SERVICE INC. and
HENRY GIRWOOD
Office and P. O. Address
110 William Street
New York, New York 10038

TO: STANDARD, WEISBERG,
HECKERLING & ROSOW, ESQS.
Attorneys for Plaintiff
38 Park Row
New York, N. Y. 10038

Answers to Interrogatories (Action No. 1).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc. *et ano.,*

Defendants.

Index Number 73C2962 CMM

Plaintiff answering the interrogatories propounded by the defendant by his attorneys Standard, Weisberg, Heckerling & Rosow, states as follows:

1. Thomas J. Chiariello, January 14, 1937, New York City.

2. No.

3. No.

4. Plaintiff at the time of his accident was residing at 148 Figurea Avenue in Staten Island, New York.

5. 1963-1965 2041 East 8th Street Brooklyn, New York 11223

1965-1973 148 Figurea Avenue Staten Island, New York 10312

1973-present 511 So. Highlands Drive Hollywood, Florida 33021

6. Plaintiff is married.

a. Angela

Answers to Interrogatories (Action No. 1)

b. Angela H. Cardillo

c. 5221 17th Ave.; Bklyn., N. Y.
2051 East 8th St., Bklyn., N. Y.

d. 6/11/61; Holy Ghost R.C. Church, 45th St. 17th Ave., Bklyn., N. Y.

e. Plaintiff is residing with his spouse.

f. Inapplicable

g. Inapplicable

7. Plaintiff was not previously married.

8. a. Universal Stevedore, 1 Broadway, New York City

b. Plaintiff commenced his employment on November 1, 1967 and has performed no work from the date of his accident to the present date.

c. Plaintiff's work was that of superintendent of the Military Ocean Terminal at Bayonne, New Jersey.

d. Plaintiff earned approximately $17,000.00 a year.

e. No.

f. Mr. Bob Martin

9. Plaintiff's social security number is 127-28-0114.

10. No, except for present injuries.

11. Yes.

a. Social Security & Union Mutual Disability Insurance.

b. January 1, 1973

c. The injuries inyolved in the current accident.

d. Social Security & Union Mutual Disability Insurance

e. and f. Injuries involved in the current accident.

Answers to Interrogatories (Action No. 1)

12. a. $17,000.00 for 1971, other years not available

b. $17,000.00 for 1971, other years not available.

c. Plaintiff will obtain information from tax reports.

13. a] Income tax returns not currently
b] available; will be obtained and
c] will be made available at a later
d] date.
e]
f]

14. McDonough School, McDonough, Maryland, 1943-1955, Academic Course
University of Miami, Coral Gables, Fla., 1955, Business Course

15. Yes.

a. United States Air Force

b. Dec. 16, 1955—May 7, 1959, Lackland A. F. Base, Texas & Laredo A. F. Base, Texas.

c. AF11312340

d. Yes, New York City

e. Honorable Discharge

f. Honorable Discharge

16. No.

17. No.

18. a. No.

b. No.

c. No.

d. No.

e. No.

Answers to Interrogatories (Action No. 1)

19. Appendix removed 1953 or 1954, Union Memorial Hospital, Baltimore, Maryland. Attending doctor: Dr. Willgas.

20. No.

21. No.

22. a. Motor Vehicle Department, Albany, N. Y.

b. Date not known.

c. Written.

d. Signed.

e. Motor Vehicle Bureau

23. Plaintiff up to the present time has not obtained the names of any witnesses to the happening of his accident. Plaintiff's medical witnesses are those physicians who treated him for the injuries he sustained and whose names and addresses are hereinafter set forth.

24. Plaintiff intends to use those witnesses who may come to plaintiff's attention and who have knowledge of the circumstances surrounding the accident, and those medical witnesses who treated the plaintiff for the injuries he sustained and who will in the future treat the plaintiff for the injuries he sustained.

25. The police officers at the scene of the accident whose names and addresses are currently not known.

26. a. The driver of the bus made statements at the scene of the accident.

b. Such statements were made to police officers.

c. Following the accident.

d. Plaintiff is not aware of any other persons being present.

e. None to date.

Answers to Interrogatories (Action No. 1)

27. Not applicable.

28. Other than police report, no other statements obtained.

29. Plaintiff at this point in time cannot state whether expert witnesses are required other than medical experts previously indicated.

30. Plaintiff is not aware of the statements of defendant's medical experts and cannot at this time answer this interrogatory.

31. As a result of the accident, the plaintiff sustained an acute muscular ligamentous sprain and derangement of the cervical and upper dorsal spine with secondary development of a cervical radiculitis and traumatic myositis of the paravertebral musculature of the cervical spine. Plaintiff has a nerve root compression involving the brachial plexus in the cervical area which is indicative of discogenic disease. Plaintiff sustained injury of the lumbar and lumbo-sacral area in the nature of acute muscular and ligamentous sprain and derangement with secondary development of right sided sciatic neuritis with nerve root compression, and herniated intervertebral disc at L4-5 on right side and L5-S1 on right side. Plaintiff experienced muscle spasm, limitation of motion, atrophy, reflex changes and weakness in dorsiflexors of foot and ankle and extensors of big toe with associated sensory and motor changes. Plaintiff has numbness and paraesthesias in the toes of right foot, pain in right ankle, pain and stiffness of the cervical spine, pain in right shoulder and scapular area with numbness and paraesthesias in fingers of right hand with associated swelling of the fingers of the right hand. Plaintiff experienced sexual impotency, severe headaches and nervousness.

Answers to Interrogatories (Action No. 1)

32. a. Previously described.

b. Previously described.

c. Plaintiff suffers pain from the date of the accident up to the present date and plaintiff has been totally disabled from the date of the accident to the present date and will be totally disabled for an indefinite period of time in the future.

33. a. Richmond Memorial Hospital, Staten Island, New York.

St. Vincent's Medical Center, Staten Island, New York.
Richmond Memorial Hospital, Richmond, Virginia.

b. Plaintiff was treated at Richmond Memorial Hospital on July 14, 1972, August 29, 1972, November 2, 1972, November 9, 1972, November 14, 1972, November 16, 1972 and December 11, 1972; Plaintiff was treated at St. Vincent's Medical Center on August 22, 1972, August 24, 1972, August 25, 1972, August 31, 1972, September 5, 1972, September 6, 1972, September 30, 1972; Plaintiff was treated at Richmond Memorial Hospital in Virginia as an in-patient from January 26, 1973 to January 31, 1973.

c. Plaintiff's bill at Richmond Memorial Hospital in Staten Island was approximately $256.00, at St. Vincent's Hospital in Staten Island $112.50, at Richmond Memorial Hospital in Virginia $507.90.

d. Dr. L. Jackson Spitz, 902 East 86th Street, Brooklyn, New York; Dr. Luis G. Moreno, 288 Newdorp Lane, Staten Island, New York; Dr. Benjamin E. Lanier, 925 Ocean Avenue, Brooklyn, New York; Dr. H. R. Leventhal, 1099 Targee Staten Island, New York; Dr. Laurie E. Rennie, Lee Medical Building, 1805 Monument Avenue, Richmond, Virginia; Dr. N. D. Crishne

Urs, 1877 Clove Road, Staten Island, New York; Dr. Arthur Friedman, 14 East 90th Street, New York, New York.

e. Dr. Urs—$125.00; Dr. Spitz—$291.00; Dr. Frank—$145.00; Dr. Rennie—$242.50; Dr. Moreno—$55.00; Dr. Lanier—$100.00; Dr. Leventhal—$20.00; Dr. Friedman—$250.00.

34. Plaintiff received at the St. Vincent's Hospital cervical traction, heat and massage; at Richmond Hospital in Staten Island, plaintiff received cervical traction; at Richmond Memorial Hospital in Richmond, Virginia, plaintiff received a lumbo-cervical myelogram.

35. Plaintiff to date has not received treatment from any other doctor than hereinabove stated.

36. Wet heat pack, back brace, cane, orthopedic mattress —approximately $375.00.

37. a. Intermittently, plaintiff uses heat pack, back brace, cane and orthopedic mattress; Dr. Urs, Clove Road, Staten Island—soft collar brace Dr. Rennie, Richmond Virginia—heat pack; Dr. Spitz, Brooklyn, New York—back brace and cane; Dr. Moreno—orthopedic mattress.

b. Heat pack—$10.00
Back brace—$12.95
Cane—$6.00
Orthopedic mattress—$345.00
Collar brace—$7.95

c. Approximately July, 1972.

d. and e. The aforesaid appliances are used some intermittently and some constantly.

38. No.

Answers to Interrogatories (Action No. 1)

39. Plaintiff to date has not had any additional financial expenses. Plaintiff anticipates that there will be future expenses for medical and surgical treatment.

40. The defendant, its agents, servants and employees were reckless, careless and negligent in allowing and permitting its omnibus to run into the rear of the plaintiff's motor vehicle and strike same, in failing to properly observe the plaintiff's motor vehicle, in failing to bring its motor vehicle to a halt prior to striking the plaintiff's motor vehicle, in so operating its motor vehicle under the existent conditions so that the defendant's motor vehicle was caused to strike the plaintiff's motor vehicle which was at a stand still, in failing to observe the existent conditions at the place of occurrence and in so operating its motor vehicle so as to cause the accident.

41. The defendant's employee was in control of its omnibus at the time of the accident.

42. No.

43. No.

44. None

45. a. New York State

b. 1975

c. C0831234487830911-37

d. corrective lens

46. No.

47. Plaintiff was returning from his place of employment to his home.

48. Plaintiff's home.

49. Approximately 6:10 P.M.

Answers to Interrogatories (Action No. 1)

50. Plaintiff stopped for traffic lights and was stopped at the time of the accident.

51. Not applicable.

52. None

53. Angela H. Chiarello, 148 Figurea Avenue, Staten Island, New York.

54. It had rained prior to the time of plaintiff's accident.

55. Roadway was wet.

56. Visibility was good.

57. Plaintiff was familiar with the scene of accident.

58. The defendant's motor vehicle ran into the rear of the plaintiff's motor vehicle. Both vehicles were headed in the same direction. Plaintiff's motor vehicle was at a stop. Defendant's motor vehicle struck plaintiff's motor vehicle in the rear.

59. No.

60. Plaintiff's vehicle was not repaired.

61. Plaintiff's vehicle was a total wreck.

62. No information.

63. Plaintiff is still in need of surgical repair of the herniated disc.

64. Plaintiff has been intermittently confined to his bed and home from the date of the accident up to the present time.

65. a. For corrective vision.

b. Yes.

66. Plaintiff has purchased medication at various drug stores. The estimated cost of such medication is $3,000.00 to date.

Answers to Interrogatories (Action No. 1)

67. No.

68. Plaintiff is not aware of any testimony taken in connection with the accident.

Dated: New York, New York
September 20, 1973

Yours, etc.,

STANDARD, WEISBERG, HECKERLING & ROSOW
Attorneys for Plaintiff
By: /s/ Morton L. Heckerling
A Member of the Firm
Office & P. O. Address
38 Park Row
New York, New York 10038

To:

Daniel J. Coughlin
Attorney for Defendants
Domenico Bus Service, Inc. and Henry Girwood
110 Williams Street
New York, New York

Pre-Trial Order (Action No. 1).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARIELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRWOOD,

Defendants.

73 Civ. 2962
Judge Metzner

On the 2nd day of May, 1975, the parties to this action or their attorneys appeared before the Court at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken;

1. The pleadings were deemed to be amended in accordance with the framing of the issues in this action in paragraph 6 of this pre-trial order.

2. The parties agreed that the trial of this action is based upon this Order and upon the pleadings as amended, and that the plaintiff will move to amend the *ad damnum* clause of the complaint to the sum of Five Million ($5,000,000.00) Dollars on the trial of this action.

3. The following issues raised by the pleadings are expressly abandoned: Plaintiff's contributory negligence.

(a) The parties stipulated that the following facts are not in dispute in this action (each party reserving the

right to object to the materiality of such stipulated facts and its relevancy to the issues):

1. The jurisdiction of this court in this matter is conceded.

2. That on June 30, 1972, the defendant owned the bus identified in the complaint and its driver, Henry Girwood, was operating said bus in the furtherance of his duties as a bus driver.

(b) It is the plaintiff's contention that on June 30, 1972, he was employed as a superintendent by Universal Terminal & Stevedoring Corp. and while returning home from New Jersey to Staten Island, his automobile was struck in the rear by defendant's bus, causing him to sustain severe personal injuries.

The said accident was caused without any contributory fault or lack of care on the part of the plaintiff but solely by reason of the carelessness and recklessness on the part of the defendant, its agents, servants or employees in that they failed to keep the road under observation and their automobile bus under control; in that said automobile bus was driven at an excessive rate of speed under the circumstances; in that they failed to give timely signal or warning of their approach and that with plaintiff's motor vehicle in full view they nevertheless operated said bus at such a speed that it violently struck plaintiff's car in the rear; in that they violated the Vehicle and Traffic Laws of the State of New York and the State of New Jersey; in that they followed plaintiff's automobile too closely; in that they failed to avoid said accident, although they had reasonable opportunity to do so, and in that they were careless and negligent in other respects.

It is the plaintiff's contention that as a result of the accident he sustained the following personal injuries:

Herniated disc L4-L5 on the right;

Hemi-laminectomy with neuralysis and excision of the herniated neucleus pulposis L4-L5 was done and also exploration at L3-L4.

Tear of the dural sleeve during operative procedure requiring repair;

A second operation was performed—percutaneous articular rhizotomies, bilateral at L4-L5; L5-S1.

Epidural adhesions;

Neuropathy of the right greater occipital nerve and radiculopathy of the right cervical 5, 6 and 7 nerves.

Radiculopathy of L4-5 and S-1 on the right side in the lumbar region;

Nerve root compression involving the brachial plexus in cervical area;

Herniated cervical intervertebral disc;

Acute muscular and ligamentous sprain of the cervical spine;

Derangement of the cervical and upper dorsal spine with secondary cervical radiculitis and myositis paravertebral musculature of the cervical spine.

Acute muscular and ligamentous sprain and derangement of the lumbar sacral spine with right sided sciatic neuritis with nerve root compression;

Severe psychiatric injury with sexual impotency;

Severe nervousness;

Shock.

Between the period of time that Mr. Chiariello underwent the laminectomy and his second operation, he was forced to wear a machine which killed nerve impulses from the brain to the spine. Following the second operation, these nerves were severed and did not submit pain.

At the present time, Mr. Chiariello is still totally disabled. He suffers from severe pain, tenderness and limitation of motion of the cervical and lumbo-sacral spine; nerves in the spine have been severed in an attempt to alleviate some of the pain Mr. Chiariello endures.

He still has muscle spasm, atrophy and weakness in dorsi-flexion of the foot and ankle and extensors of the big toe with associated sensory and motor changes. He has numbness and parathesia in the toes of the right foot and right ankle; pain and stiffness of the cervical spine; pain in right shoulder and scapular area with numbness and parasthesia in the fingers of the right hand with associated swelling of the fingers of the right hand; sexual impotency; severe headaches; nervous depression, irritability; inability to sleep, and inability to get along with his family.

Some or all of the conditions claimed may be permanent.

Plaintiff loss of earnings to date amounts to the sum of $60,000.00. Future loss of earnings will amount to an additional $700,000. Medical expenses to date amounts to approximately $30,000.00. Damages for pain and suffering and permanency are undetermined.

Plaintiff was born on January 14, 1937. He is now 38 years of age and has a life expectancy of some 33 years, based on the life expectancy tables contained in the Civil Practice Law and Rules.

3. (c) It is the contention of the defendant that there was no negligence. It is defendant's further contention that plaintiff did not sustain injuries and damages to the extent he claims.

4. (a) Plaintiff may produce some or all of the following witnesses:

Angela Chiariello;
Dr. Samuel Leone;
Dr. Howard Freedman;
Dr. Lawrence Kaplan;
Dr. Gervin;
Dr. Arthur Michele;
Dr. L. Jackson Spitz;
Dr. Lanier;
Dr. Laurie E. Rennie;
Dr. Urs;
Dr. Leventhal;
Dr. Moreno.
Henry Girwood.

Plaintiff reserves the right to call any and all witnesses listed by the defendant and reserves the right to call any other witnesses as may become necessary.

Plaintiff may use some or all of the following exhibits:

Income tax and W-2 forms
Hospital record of Golden Isles Hospital;
Hospital record of Memorial Hospital;
Hospital record of St Vincent's Medical Center of Richmond;
Hospital record of Richmond Memorial Hospital, Richmond, Virginia;
Deposition of defendant;
Medical reports of any and all witnesses called;
Police Report of the Port Authority of the City of New York.

4. (b) Defendant may produce the following witnesses:

Henry Girwood
Dr. Duke Baird
One other medical expert.

Pre-Trial Order (Action No. 1)

Defendant may produce any and all hospital records and deposition of plaintiff.

5. The parties also agreed on the following matters:

Plaintiff at this time expects to require four trial days; the defendant at this time expects to require two trial days.

5(a) By stipulation dated May 2, 1975, this action is consolidated with later action (75 Civil 1956) an action by wife of plaintiff in 73 Civil 2962 against same defendants for loss of services resulting from same accident.

6. The issues to be tried are formulated by the Court (with the consent and agreement of the parties) as follows:

(1) What is the pecuniary value of the plaintiff's damages?

(2) Was the defendant negligent?

Dated: New York, New York
May 2, 1975.

So Ordered

J. S. D. J.

MARTIN LASSOFF
Attorneys for Plaintiff

DAVID J. COUGHLIN
Attorneys for Defendants.

Complaint (Action No. 2).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ANGELA CHIARIELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRWOOD,

Defendants.

Plaintiff demands a trial by jury.

Plaintiff, complaining of the defendants, by her attorney, Martin Lassoff, alleges as follows:

I. That at all the times hereinafter mentioned plaintiff was a citizen of the State of New York and residing at 148 Figuera Avenue, Staten Island, New York.

II. Upon information and belief that at all the dates and times hereinafter mentioned, the defendant, Domenico Bus Service Inc. was and still is a foreign corporation duly organized and existing by virtue of the laws of the State of New Jersey.

III. Upon information and belief that at all the dates and times hereinafter mentioned, the defendant, Domenico Bus Service Inc. was and still is authorized and licensed to transact business in the State of New York.

IV. Upon information and belief that at all the dates and times hereinafter mentioned, the defendant, Henry Girwood, was and still is a resident of Kearny, New Jersey.

FIFTH: That the jurisdiction of the within action is based upon the diversity of citizenship as between the plaintiff and defendants.

SIXTH: That the matter in controversy herein, exclusive of costs and interest is in excess of the sum of $10,000.00.

SEVENTH: That at all the dates and times hereinafter mentioned, the defendant, Domenico Bus Service, was the owner of a certain General Motors Bus, bearing license plate #OXN 242 issued by the Motor Vehicle Department of the State of New Jersey.

EIGHTH: Upon information and belief that at all the times and dates hereinafter mentioned, the defendant, Henry Girwood, was operating the aforesaid motor vehicle with the knowledge, consent and permission of the defendant, Domenico Bus Service, Inc.

NINTH: Upon information and belief that at all the dates and times hereinafter mentioned, the said vehicle was controlled by the defendant, Henry Girwood, with the knowledge, consent and permission of the defendant, Domenico Bus Service, Inc.

TENTH: That at all the times and dates hereinafter mentioned, the defendant, Henry Girwood, was in the employ of the defendant, Domenico Bus Service, Inc.

ELEVENTH: That at all the dates and times hereinafter mentioned, the defendant, Henry Girwood, was performing services as a bus driver on behalf of the defendant, Domenico Bus Service, Inc.

TWELFTH: That at all the dates and times hereinafter mentioned, the plaintiff's husband was operating a motor vehicle bearing license No. JR 7207 duly issued by the Motor Vehicle Bureau of the State of New York.

Complaint (Action No. 2)

THIRTEENTH: That at all the dates and times hereinafter mentioned the aforesaid motor vehicles were operated in the vicinity of the New Jersey entrance of the Bayonne Bridge.

FOURTEENTH: That on or about June 30, 1972, without any fault on the part of the plaintiff's husband and by reason of the carelessness, recklessness and negligence of the defendants, their agents, servants and/or employees, the defendants' motor vehicle was caused to run into and strike the rear of the plaintiff's husband's motor vehicle, and by reason thereof, plaintiff's husband was caused to be injured.

FIFTEENTH: That by reason of the premises aforesaid, plaintiff was deprived of the services, society and consortium of her husband and is still so deprived.

WHEREFORE, plaintiff demands judgment in the sum of One Million ($1,000,000.00) Dollars, all together with the costs and disbursements of this action.

MARTIN LASSOFF
Attorney for Plaintiff
Office & P. O. Address
160 Broadway
New York, New York 10038

Answer of Defendant Domenico (Action No. 2).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ANGELA CHIARIELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRWOOD,

Defendants.

75 Civ. 1956
Judge Werker

Defendant, Domenico Bus Service Inc., by Daniel J. Coughlin, attorney, answering the complaint of the plaintiff, alleges:

1. Denies having knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraphs designated "I", "IV", "Fifth" and "Twelfth".

2. Denies each and every allegation contained in paragraphs designated "Sixth", "Fourteenth" and "Fifteenth".

FIRST DEFENSE

3. That this Court does not have jurisdiction over the person of the defendant nor over the subject matter in litigation.

Answer of Defendant Domenico (Action No. 2)

SECOND DEFENSE

4. That the complaint does not set forth a cause of action upon which relief may be granted in any Court sitting within the territorial limits of the State of New York.

THIRD DEFENSE

5. That the venue of this action has been improperly laid in The Federal Court sitting within the limits of the State of New York.

FOURTH DEFENSE

6. That any injuries allegedly sustained by the plaintiff's husband and the damages allegedly sustained by the plaintiff were caused or contributed to by the negligence and carelessness of the plaintiff and her husband.

WHEREFORE, defendant, Domenico Bus Service Inc., demands judgment dismissing the complaint of the plaintiff, together with costs and disbursements herein.

DANIEL J. COUGHLIN
Attorney for Defendant Domenico
Bus Service Inc.
110 William Street
New York, New York 10038
(212) 233-5010

TRANSCRIPT (FIRST TRIAL).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

THOMAS J. CHIARELLO and ANGELA CHIARELLO,

Plaintiffs,

-v-

DOMENICO BUS SERVICE, INC., and HENRY GIRDWOOD,

Defendants.

73 Civ 2962
75 Civ 1956

----------x

Before:

HON. CHARLES M. METZNER,

District Judge

New York, N.Y.
January 13, 1976 - 10:30 a.m.

APPEARANCES:

MARTIN LASSOFF, ESQ.,
Attorney for Plaintiffs

MC CARTHY, SCHULTZ & MULHOLLAND, ESQS.
Attorneys for Defendants
BY: JOHN SCHULTZ, ESQ.,
and
ELLIN MULHOLLAND, ESQ.,
of Counsel

THE COURT: Let me see counsel.

Send for the jury.

I will see counsel at the bench, please.

(At the bench.)

THE COURT: You are both deficient on your New Jersey law. I don't know why I should do your work for you. You have not proven to me yet, and my preliminary research shows, ordinances or regulations of cities are not evidence of negligence in New Jersey. Therefore, you don't get it because the states have given this authority the right to adopt regulations.

MR. LASSOFF: I would agree, your Honor, it's not evidence of negligence per se, but it is some evidence to be considered by the jury. I have a case.

THE COURT: Well, give it to me. I don't have it.

MR. LASSOFF: All right, your Honor, I will.

THE COURT: All right. Make sure you've got all the New Jersey law in front of me before I charge the jury.

We will have a short recess, then, until the jury comes in.

(Recess.)

THE CLERK: Thomas J. Chiarello against Domenico Bus Service, Inc.

MR. LASSOFF: Plaintiff ready.

MR. SCHULTZ: Defendant ready.

(A jury was duly impaneled and sworn.)

(One alternate juror was sworn.)

THE COURT: Ladies and gentlemen of the jury, from this moment on until the case has been submitted to you for determination, you are not to discuss the case and the evidence you will hear with anyone else, not even among yourselves. It is obvious why you shouldn't talk about the case with anyone else. The reason we ask you not to discuss the case among yourselves is because you may reach conclusions in your own mind or influence your fellow jurors before all the evidence is in.

It is the function of the jury under our system of law for the jurors to keep their minds open until the case is finally submitted to you for determination.

Mrs. DeGeorgio will show you the juryroom. We will have a short recess and then we will start the trial.

(Recess.)

(Jury present.)

THE COURT: You may proceed.

MR. LASSOFF: May it please the Court, Mr. Schultz, Miss Mulholland, Madam Forelady and ladies and gentlemen of the jury.

You have heard his Honor tell you this is an

accident that involves my client's car being struck by a bus. This accident happened June 30, 1972, and it happened on a ramp of the Bayonne Bridge coming back from New Jersey to Staten Island. I don't know if you're familiar with this bridge, but that is a basic bridge between the State of New Jersey and Staten Island.

And the defendant in this matter, the Domenico Bus Company, is an intrastate carrier. It picks up people in Staten Island and New Jersey and makes a route between the two places delivering passengers.

The accident happened around 6, 6:30 in the evening. My client was coming home from his work. He worked as a pier superintendant at the pier in Bayonne, New Jersey, called the Bayonne Military Ocean Terminal. This is a government facility. If you recollect 1971, we were involved in several foreign altercations, and this was a facility owned by the government whereby government ships and ships chartered from the government would come in to be loaded and discharged.

My client worked as a pier superintendant for the stevedoring company that was doing the actual loading and discharging of vessels at this government facility, Universal Terminal and Stevedores Company, Inc.

As I say, he was coming home from work and he was

attempting to get on and cross the Bayonne Bridge to go to his home in Staten Island.

To get on the bridge, naturally, there's a ramp, an entrance ramp to get on. And shortly before this accident there had been one of New York's usual summer thunderstorms or rain showers where the water comes down like buckets, like solid sheets. It wasn't raining at the time, but the roads were very wet and parts of the bridge were flooded. There were pools of water.

As my client went through a dip in the road, where there was a railraod trestle overhead getting onto the approach, he saw in front of him two other vehicles, one of which was slowing and one was stopped, because in front of the vehicle that was stopped, there was a pool and a rather deep pool of water. He stopped because you had to go through this pool of water slowly. It wasn't just a covering, it was inches deep.

When the accident occurred, my client had come to a stop behind the vehicle immediately in front of him, ten feet behind this vehicle, and the third car, the one in front of that, was proceeding slowly through this pool of water.

The bus came up out of the dip and traveled at least 75 feet; both my client and the bus driver whose testimony says 75 feet, from the pictures it looks considerably

more to me, but you'll be able to see the pictures and judge for yourselves, and while both of these cars were stopped, my client's car was struck in the rear by this bus, pushed into the car in front and kaput. The front seat of his car was broken off, it went down, was snapped off. You will hear all that from the client. The car was disabled, had to be towed off the bridge. The police came, the Port Authority Police, New Jersey police, and my client's father and wife were called. They took him home. This was, I believe, Friday night.

My client saw Dr. Spitz Monday morning; Dr. Spitz did certain things that he will testify to. He then came under the care of many doctors. Primarily in this incident he hurt his neck, which was the most bothersome initially, his back, which turned out to be a horrendous injury, and other things that we will have. Medical doctors of the highest caliber will come here to tell you about it.

As a result of this incident, my client has never been able to work again and it is our claim that he will never be able to work again. That he has had to undergo surgery not once but twice and still may require further surgery.

That he had a laminectomy, which is an operation on the spine to remove the ruptured disc; that in the course

of that operation the dural sleeve of the spine was torn causing scarring and nerve damage.

That as a result of that, after the operation they gave him a machine and you will hear testimony about this machine. This machine kills the impulse of pain from the brain to the spine, which you don't feel the pain. It doesn't cure the pain. It just doesn't transmit the message.

This machine worked for a short while and then didn't work because the pain went right through the machine.

He then was admitted to the hospital in 1974 where they performed an operation called a Lushka Rhizotomy. In simple layman's language, what they did, they tried to stop the pain by burning out the nerves in the spine through electrical devices. You will hear a description of that.

Thereafter, the pain down one side of the leg went away, came back. My client again, as late as June, July-- July 28, 1975, had further myelograms taken which show that he still has a defect in that spine, that there is probably still a herniated disc there, that may or may not be remediable because, as the doctors will tell you, this pain may be caused by scar tissue and a further operation will not heal that. My client at the time of this accident, as I told you, was a pier superintendant; was earning approximately $17,000 a year. We will show you that currently the

same job pays between 21 and $22,000 a year. And we will show you the increase year by year on the job.

We will show you that more than the physical injury and more than the pain--and incidentally, you will hear that pain is intractable. Intractable means that a medication won't help it. They have no way of stopping this pain. No way known to medical science.

It's been a disintegration of a life, a disintegration of a family, a disintegration of a father. You will hear testimony as to how this injury has affected Mr. Chiarello's relationships with his children, with his wife, how he was completely forced to change his way of living, how he not only had to give up his job because of the injuries, was compelled to move to Florida, where he lives now. The physical facts of the accident are quite simple. There will be no testimony that the accident didn't happen just the way I told you. We've had a deposition of the bus driver. I'm going to ask you to pay very close attention to the medical aspects of this case because the injuries are overwhelming and we are going to ask you to award a verdict amounting to millions and I mean that seriously.

You will hear from Mr. and Mrs. Chiarello that this has destroyed them. Thank you very much.

THE COURT: Mr. Schultz?

MR. SCHULTZ: If the Court please, Mr. Lassoff, ladies and gentlemen of the jury:

This is all the time that is alloted to the lawyers to give you some idea as to what they intend to prove. It's similar to an index to a book so that you can intelligently follow the course of the trial.

This occurence took place on June 30, 1972. Mr. Girdwood, one of the defendants in this action, was a bus driver. He was proceeding from New Jersey over the Bayonne Bridge to go to Staten Island. It had rained. Mr. Girdwood had, I think, 50 or 51 passengers in his bus and he was traveling onto a rampway which was the entrance way to this Bayonne Bridge. He proceeded along and there was a dip in the roadway in which there was a flooding condition. He was able to see traffic ahead of him because of the height of the bus.

He went through this puddle of water and the vehicle ahead of him stopped. There was a vehicle ahead of it that was moving slowly.

Mr. Girdwood attempted to stop his bus and there is no question but that there was an impact between his vehicle and that of the plaintiff.

The plaintiff got out of his car and walked around

and the vehicles were moved to the other side of the bridge, pushed. There was a hospitalization of Mr. Chiarello in January of 1973, more than six months following this occurrence, and this hospitalization resulted in a diagnostic procedure.

In December of 1973, he was operated on in Florida. He apparently had moved to Florida and at one point I believe he was living in the home of a brother who lived there or some relative who lived in Florida.

That is a brief outline of the hospitalization. You will hear the treatment. There is a sharp dispute in this case as to whether or not the defendant, Mr. Girdwood, who was the operator of the bus, was negligent or whether this was an incident that was occasioned in the truest sense of the word without fault.

Having that dispute in mind, the other dispute is whether or not the injuries that are claimed as a result of this occurrence actually in fact were the result of this accident or whether it was occasioned by some other extraneous causes. This is a question of proof.

So it is the contention of my client, and we hope to prove it to you, that, yes, there was an accident. It was not occasioned as a result of the negligence of the driver.

Furthermore, we hope to prove to you that the injuries that are claimed in this case, first of all, are not as serious as they claim them to be; and secondly, that they may not be the cause or have been caused by this particular accident in question.

The defendant in this case, the two defendants, Mr. Girdwood, the driver and the bus company, of course at this point cannot give you a complete outline as to what they intend to prove because it is dependent upon the plaintiff's proof as to what we must oppose and reach.

So I ask you to please do justice in this case by sitting back and listening and not making a judgment until you hear all of the evidence.

With that in mind, I thank you and I thank you for your courtesy and I will have the opportunity after this case is over, not only the opportunity, but the privilege and the duty, to come to you to review evidence to assist you in making a decision. However, at that point the proceedure will be reversed. I will speak first and then Mr. Lassoff will speak last.

So until then, thank you.

THE COURT: Your first witness, Mr. Lassoff.

MR. LASSOFF: Mr. Chiarello, would you take the stand please.

dh 1 Chiarello-direct

P 12

THOMAS J. CHIARELLO, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Mr. Chiarello, do you remember the 30th day of June, 1972?

A Yes, sir, I do.

Q Did you meet with an accident on that date?

A Yes, sir.

Q Can you tell me where that accident occurred?

A On the approach ramp -- on the left approach ramp to the Bayonne Bridge coming from New Jersey to Staten Island.

Q Can you tell us what time that accident occurred?

A Approximately 6 or 6:30.

Q Where were you coming from?

A From the Military Ocean Terminal in Bayonne, or Bayonne Army Terminal, as we call it.

Q Is that where you worked?

A Yes, sir, it is.

Q On that day, what was your job?

A I was terminal superintendent in charge of truck loading, unloading, rail car loading and unloading.

Q For whom?

A For Universal Terminal Stevedores.

Q Is that the stevedoring company who had the contract with the Army at that particular terminal to do the work?

A Yes, sir.

Q How long had you had that job?

A At the Bayonne Army Terminal or with Universal itself, sir?

Q Let's start with the Bayonne Army job.

A Approximately four months.

Q Had you been a pier superintendent or a terminal superintendent prior to that?

A Yes, sir, I had.

Q How long had you been a terminal superintendent?

A For Universal themselves?

Q Yes, sir.

A I was prior to that with someone else.

Q All right.

A Since November 1, 1967.

Q Prior to being a superintendent for Universal, were you a superintendent for some other stevedoring company?

A Yes, sir, I was.

Q What company was that?

A American Stevedores.

Q When did you become a pier superintendent for American Stevedores?

A I got my superintendent's license with them in 1961.

Q May we have your date of birth, Mr. Chiarello?

A 14 January 1937.

Q Incidentally, in 1967, did Universal Terminal and Stevedoring Corp. buy American Stevedoring Corp.?

A Yes, sir, they did.

Q Actually you worked with the same people but it was a different company?

A Yes, sir.

Q Can you tell me, how far away is the Bayonne Military Ocean Terminal from the Bayonne Bridge?

A It would be a guess. It would probably be four, five miles.

Q How did you get from the Military Ocean Terminal to the bridge?

A By car and you come out of the Army Terminal, make a couple of turns. I don't know the names of the streets. I don't know the names of the streets.

Q Is there a main street that you drive most of the distance on?

dhh 4 Chiarello-direct

Cr. 15

A Yes, sir, there is.

Q What kind of a car were you operating on that day?

A 1972 Plymouth Valiant Scamp.

Q Was that your car?

A Yes, sir, it was.

Q Was there anyone else in your car at the time of this accident?

A No, sir, there wasn't.

Q Prior to your getting on this entranceway or ramp to the bridge, is there a traffic signal of some kind?

A Prior to making the left turn off of that main artery that you come to get to the bridge, there is a traffic signal. At that traffic signal you do make a left turn and then you approach the bridge.

Q Had you made a stop at that traffic signal before you approached the bridge?

A I couldn't say whether the light was green when I got there or if it had been red and I had to stop. I don't know. I couldn't answer that honestly.

Q In any event, there did come a time when you approached the bridge?

A Yes, sir.

Q Can you tell me what the weather conditions were like?

A Well, as I had left the Army terminal, it had been a thunder storm that I passed through. It was a normal summer evening thunder storm. Good heavy rain.

I had gotten out of the thunder storm about six blocks prior to making that left turn which approaches the Bayonne Bridge. At that time it was clear, as you know, the thunder storms come, you come in and out of them, and it was clear at that time that I made the left turn to make the approach to the bridge.

Q So that it was not raining at that point?

A No, sir, not at the time of the accident.

Q All right.

Tell me what you did from that point on.

A You make the left turn and there is a railroad trestle ahead of you. You go -- you have to stay to your right because there's a sign ahead of you which says "Bridge traffic right lane." You approach in two lanes. The left lane is separated by double yellow lines and that is only a left turn lane as you approach the bridge approach. You take a dip under the trestle, under the railroad trestle. There's a deep dip and it is fairly long, about, oh, I would say, about four, five car lengths long. You

come up out of there and you have an unobstructed view and an approach to the bridge ramp, I would say, of about a hundred to 150 feet.

And then you get -- the road is blocked as you get on the ramp, the road is blocked by a curb on your right and a concrete wall on the left, which separates the down traffic off the bridge from the up traffic.

And as I said, that double yellow lane which allows two cars to come up together stops where that wall starts and that traffic in the left lane must make a left turn off of there. And the other traffic in the right lane on the bridge approach goes up the ramp and meets traffic coming from the other side and they proceed up onto the bridge itself.

Q Prior to this accident occurring, had you come out of that dip where the railroad trestle is?

A Yes, sir, I had.

Q I show you this photograph and ask you if it fairly and accurately shows that railroad trestle as it existed at the time you got hurt.

A Yes, sir, this is a view looking back from approximately the point of the accident, yes, sir. This is exactly it.

Q So that from where this picture was shot was from

approximately where the accident took place further on down the road?

A Yes.

MR. SCHULTZ: If your Honor please, may I respectfully object at this time? He's discussing something which is not in evidence.

THE COURT: He can mark it for identification.

MR. LASSOFF: Do you want to see it, Mr. Schultz?

MR. SCHULTZ: I would like to. Have it marked for identification, first.

xx (Plaintiffs' Exhibit 1 marked for identification.)

MR. SCHULTZ: May I have some questions on the voir dire, your Honor, please?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. SCHULTZ:

Q Mr. Chiarello, with relation to Plaintiffs' Exhibit 1 for identification, did you take these pictures?

A Yes, sir, I did.

Q Could you tell us when you took them?

A Sunday, sir.

Q This past Sunday?

A Yes, sir.

Q Sir, have you been living in Florida for at

least three or four years?

THE COURT: That's not proper voir dire.

MR. SCHULTZ: It is because of the fact, Judge, I want to know whether he knows whether the conditions have changed.

MR. LASSOFF: He said it was--

THE COURT: His testimony was that this correctly represents the conditions as they existed at the time of the accident.

MR. SCHULTZ: Judge, may we approach the bench, your Honor?

THE COURT: Sure.

(At the side bar.)

MR. SCHULTZ: If your Honor please, first of all, there is snow here. There's snow all over the place.

Secondly, mainly because he says it is the same doesn't mean that I'm bound by that.

THE COURT: It is his testimony that it is.

MR. SCHULTZ: I know, but Judge, don't I have a right on voir dire to ask him when he last saw this thing before he took the pictures?

THE COURT: Not for the purposes of voir dire.

MR. SCHULTZ: I don't? All right, I will have to be guided accordingly.

dhh 9 Chiarello-direct 20

THE COURT: He says it correctly represents it. You brought out he hasn't been there for three years. You can argue to the jury anything you want or have somebody else come in and testify.

MR. SCHULTZ: The only thing is I see snow on the border here. It wasn't snowing in June.

THE COURT: That isn't what it is being offered for. It is being offered for what it looks like, the physical setup of the trestle, not the fact that snow was coming down.

MR. SCHULTZ: Judge, I suppose I will have to cross-examine him on it.

THE COURT: You may.

MR. SCHULTZ: As to whether he knows whether there's been a change because I know there's been construction there.

THE COURT: You know it. He says no under oath.

MR. SCHULTZ: I understand, all right, your Honor.

(In open court.)

MR. LASSOFF: I offer that photograph in evidence, your Honor.

MR. SCHULTZ: I respectfully object, your Honor.

THE COURT: Overruled. I will point out to the

jury that the photograph is being offered for the physical relationship of the trestle, not the fact that there is snow coming down in this picture which obviously wasn't coming down in June of 1973.

(Plaintiffs' Exhibit 1 received in evidence.)

BY MR. LASSOFF:

Q When you came out of this dip by the railroad trestle, would you tell us what you saw on that day?

A Well, if I might, I saw cars ahead of me in the bridge approach lane with their lights on, taillights, excuse me. Their taillights. The car ahead of me I saw was braking to a stop and I saw another car ahead of him attempting to go through or just starting to go through the puddle.

Q When you saw this car ahead of you braking, what did you do?

A Immediately started to brake myself.

Q Can you tell me where the car directly ahead of you stopped with relation to the puddle?

A I would say at least three-quarters of a car length prior to the puddle if not a whole car length prior to the puddle.

Q Where did your car come to a stop behind this car?

A About three-quarters of a car length behind him, sir.

Q Would that be about ten feet?

A Yes, I would say about that, yes.

Q What happened after your car came to a stop?

A When I came to a stop, I looked into my rearview mirror. It is normal for me, it always has been, when I stop, I look up to see what's behind me. I looked up and I saw the bus coming out of the dip and coming hard. He came up. I braced myself because I knew that something was going to happen. I braced myself and I was hit by the bus in the rear.

Would you like me to continue?

Q Yes.

A All right. At that point you have in your seat, when you have a two-door, the seat falls forward so people can go in the back. When you set it back, there are teeth that lock it.

MR. SCHULTZ: If your Honor please, I respectfully object.

THE COURT: Sustained.

Q Tell us what happened to the seat rather than the mechanism of the seat. Okay.

The seat collapsed backwards and I fell backwards

with it. I was almost in a prone position when I was driven into the car in front of me by the force of the impact of the bus on the rear.

MR. SCHULTZ: I respectfully object, your Honor, move to strike it.

THE COURT: No, I will let it stand. That's how he says it happened.

A I hit the car in front of me and I flew forward hitting my head on the visor, coming to rest with my arms wrapped around the steering wheel.

THE COURT: You say the seat collapsed behind you?

THE WITNESS: Yes, sir, the back of the seat collapsed down.

THE COURT: Therefore, you went backwards, didn't you?

THE WITNESS: Yes, sir, I did when the bus hit me, sir.

THE COURT: You say you were lying prone with your head toward the back of the car and your feet toward the front of the car?

THE WITNESS: Yes, sir, that's correct.

THE COURT: After you were hit?

THE WITNESS: Yes, sir, that's correct.

THE COURT: Go ahead.

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THE WITNESS: Then I hit the car in front of me. This shot my body back up forward, like this, I hit my head into the visor, chest into the steering wheel and I hung onto the steering wheel. I put my foot on the brake to stop the roll of the car and that's the way I stayed.

That's it, sir.

Q Can you tell us with reference to some fixed object on the bridge where the point of that impact was?

A It's -- this would -- there is a wall, low wall, on your left. There is a fence on your right, and about 25, 30 feet behind you there is a bus shanty for passengers that are awaiting buses for inclement weather, when they're waiting for a bus.

Q I show you this photograph, Mr. Chiarello, and is this one of the photographs that you took on Sunday last, yesterday?

A Yes, sir, it is.

Q May I have it, please?

A Yes, sir.

MR. LASSOFF: May I offer it for identification?

THE COURT: Yes.

xx (Plaintiffs' Exhibit 2 marked for identification.)

MR. LASSOFF: I offer this photograph in evidence.

THE COURT: What is this supposed to represent?

MR. LASSOFF: Oh, all right.

Q Mr. Chiarello, does this photograph represent or show one of the structures that you were just talking about and if so, which one?

A Yes, sir, the bus shanty is on the right-hand side and if you look very closely, you can see the wall on the left-hand side there.

Q Would you put a BS over the bus shanty so we know what you're talking about on this photograph, sir.

A Yes, sir.

MR. SCHULTZ: If your Honor please, wouldn't it be proper to have it offered first before he marks it, your Honor?

THE COURT: It doesn't matter.

What difference does it make?

Does this represent looking backwards from where the accident happened or ahead?

THE WITNESS: No, sir, this is ahead, up to where the accident happened.

THE COURT: Ahead of where the accident happened?

THE WITNESS: No, sir, no. You are between the trestle and where the accident happened looking in the direction I was going up onto the bridge.

THE COURT: I will repeat my question. Does this represent looking back from where the accident happened or ahead from where the accident happened?

THE WITNESS: You're not at the point of the accident, sir. You're behind the accident looking towards where the accident happened, looking ahead.

THE COURT: Where was the picture taken from?

THE WITNESS: From behind, where the accident happened.

THE COURT: Oh, behind, not like the first photograph which you said was taken from where the accident happened?

THE WITNESS: No, sir.

THE COURT: Where was this photograph taken from, then?

THE WITNESS: I took the first --

THE COURT: No, the one in your hand.

THE WITNESS: Where was this taken?

THE COURT: Yes. Where were you positioned when you took that photograph?

THE WITNESS: About a hundred feet behind where the accident happened.

Q Sir, you mentioned the wall that is shown in that photograph. Would you put a W on top of that wall?

A All right.

MR. LASSOFF: I offer this photograph in evidence, your Honor.

THE COURT: Mr. Schultz?

MR. SCHULTZ: I respectfully object, your Honor.

THE COURT: Overruled.

xx8 (Plaintiffs' Exhibit 2 received in evidence.)

Q I show you this photograph and ask you if this is one of the photographs that you took Sunday morning.

A Yes, sir. That is.

Q Can you tell us from what direction that photograph was taken?

A From just behind the point where the accident occurred.

Q So it is looking backwards towards the trestle; is that what you are saying?

A No, I'm looking towards the bridge in the direction I was going.

Q Oh, I see. Okay.

Are there any structures shown in that photograph that you have already described?

A Yes, sir, there's the wall on the left.

Q All right.

A And there's the curbing on the right and you can--

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you'd have to look very closely. This is lousy photography. There is the fence on the right-hand side.

Q Would you put W for wall and F for fencing and the first letter of whatever word you say.

A All right, sir.

Q Does that photograph show the actual place where the accident happened?

A Yes, sir.

Q Can you mark with a circle the area where the accident happened?

A I did, sir.

THE COURT: How far were you from the point of the accident when you took that picture?

THE WITNESS: About 20 feet, sir.

MR. LASSOFF: I offer this photograph for identification, your Honor.

THE COURT: Do you say that the conditions on that photograph were exactly as they were?

THE WITNESS: Except for the snow, yes, sir.

THE COURT: Except for the snow. Okay.

Mr. Schultz, it is being offered into evidence.

MR. LASSOFF: I said for identification, your Honor. Because we seem to be doing it that way. I do offer it in evidence.

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(Plaintiffs' Exhibit 1 marked for identification.)

MR. SCHULTZ: I respectfully object, your Honor.

THE COURT: Overruled.

(Plaintiffs' Exhibit 3 received in evidence.)

MR. LASSOFF: May I exhibit these photographs to the jury, your Honor?

THE COURT: Not now.

MR. LASSOFF: All right.

Q At the time that this accident occurred, was either your car or the car in front of you moving in any way?

A No, sir, they were not.

Q Can you tell me approximately what distance this bus traveled from the time you saw him coming out of the dip until he hit you?

A Between, I would roughly say, a hundred to 150 feet.

Q Can you tell me how much time elapsed from the time you saw him coming out of the dip until the time he hit you?

A Just a few seconds, sir.

Q At the point where this accident occurred, how many lanes of traffic were there?

A At the point where the accident occurred there is

only one lane, sir.

Q At the time the accident occurred, the second car in front of you, what, if anything, was that car doing?

A He was proceeding through the puddle, sir.

Q Did you see or know anything about his car or the roadway as he was proceeding through the water?

A What you would normally see from a deep puddle. The water splashing up and away from the tires.

Q Did you have any trouble bringing your car to a stop behind the car that you stopped behind?

A No, sir, none at all.

Q Did you see the car in front of you come to a stop?

A Did I see the car? I saw his brake lights when he was going to stop behind the car that was going through the puddle. But to actually say I saw him stopped--saw him stop, no, I saw him stop dead when I stopped my car.

Q Did you observe any difficulty with his car moving or stopping at any time --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Did the car in front of you swerve or move in any direction except straight ahead from the time you saw him apply his lights until the time he stopped?

A No, sir.

Q Did you swerve or move in any direction from the time you slowed your car until you came to a stop?

A No, sir.

Q Following the accident, what happened?

A I sat there -- I sat there for quite a while, what seemed like quite a while, anyway. And the bus driver came over to the car and asked me if I was all right. I told him I was shaken --

MR. SCHULTZ: If your Honor please, may I respectfully object as to his conversations, that he had with the bus driver.

THE COURT: The bus driver is a defendant in this lawsuit.

MR. SCHULTZ: I'm not objecting as to what the bus driver said, I'm objecting to what he said.

THE COURT: Overruled.

THE WITNESS: May I continue?

THE COURT: Yes.

THE WITNESS: He came over and asked me if I was all right. I told him, I says "I'm shaken, but I think so."

So he said "Are you sure?"

I said "Yes."

He went back to the bus. I waited a little while longer, I got out of the car, and went back to the bus.

The driver in front of me came back also and asked if I was all right prior to my getting out, and then he went back, he followed the bus driver back to the bus and I followed the two of them back to the bus.

There in the bus we exchanged our licenses and information.

At that time I got off of the bus, went back and sat in the car.

After a length of time, I couldn't tell you how long, the police from Bayonne came. They asked me if I was hurt. I told them I thought so. I said I was pretty badly shaken.

So he went and checked the people on the bus and the other driver, too. And then the Port Authority police came, too. And they checked with everybody.

The car, after all the information was done with, the car in front of me drove across the bridge and he went. And the Port Authority police pushed my car over to the Staten Island side of the bridge. There is an area just before you reach the toll bridges on the right-hand side that is set separate for people that want to stop and make

a phone call or run out of money or something else like that.

They pushed me over and I stayed over there on the side.

Q Was there some reason you had to be pushed?

A Yes, sir. The rear was crushed on the car, but when I was driven into the car in front of me his bumper and trunk had pierced my radiator and crushed it and there was water coming out. So the car could not be driven.

Q Did somebody come and get you on the other side of the bridge?

A What I did was, when I got to the other side of the bridge, I got out of the car and I sat on a wall they have there for a while. Just to get things straight in my head. And I called, then called my home to see if my wife was home and if she could come and get me. She was not at home at that time and my brother-in-law was, and he came approximately 20 minutes later. He came and picked me up and took me home.

Q What did you do when you got home?

A Went to bed.

Q Incidentally, do you remember what day of the week June 30th was?

A Yes, sir, that's a Friday.

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Q What, if anything, did you do the next day, Saturday?

A Stayed in bed.

Q Did you call any doctor or attempt to call any doctor?

A Yes, sir, I did. I did. My doctor was -- one of the doctors that I go to in Staten Island was away, and my other doctor, Dr. Spitz, was not in, either.

Q Who was the doctor in Staten Island who was away?

A Dr. Rothman.

Q Incidentally, what happened to your car which we have left on the Bayonne Bridge on the side of the road, did somebody come and get it, finally?

A My wife, I believe, made arrangements to have it towed off and it was towed off eventually. When, I don't know.

Q When for the first time did you see a doctor?

A On that following Monday I saw a Dr. Spitz, which would be the 3rd of July.

Q Where did you see Dr. Spitz?

A In his Brooklyn office, sir.

Q What did he do?

A He gave me a complete checkup, my neck, my arm,

my back, and all the other stuff. He is a GP. Blood pressure and everything else like that.

And he suggested therapy for my neck.

MR. SCHULTZ: If your Honor please, may I respectfully move to strike what the doctor suggested or said.

THE COURT: Sustained.

Q Did you see Dr. Spitz again?

A Yes, sir, I saw him two days later.

Q What, if anything, did he do at that time?

A At that time he gave me some more therapy, and instead of having to go into Brooklyn, he suggested I see a doctor in Staten Island, because the --

THE COURT: Wait. Not because. He suggested you see a doctor.

THE WITNESS: He suggested I see a doctor in Staten Island.

Q Did you see a doctor in Staten Island?

A Yes, sir, I did.

Q What doctor was that?

A Dr. Rothman.

Q Did Dr. Rothman refer you to other doctors?

A Yes, sir, he did.

Q What other doctors did you see?

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A Dr. Urs, U-r-s, he's on Staten Island, also.

Q Do you know what kind of a doctor Dr. Urs is?

A Orthopedic neuro -- I think he's an orthopedic surgeon. Or a neurologist, one of the two.

Q Did you undergo a course of treatment with Dr. Urs?

A Yes, sir, I did.

Q Did there come a time when you went back to Dr. Spitz?

A Yes, sir.

Q Can you tell me when that was, approximately?

A I saw Dr. Spitz, I would imagine, about a month later or longer than that. I'm not positive, sir.

Q Incidentally, what parts of your body was Dr. Spitz, Dr. Rothman and Dr. Urs treating?

A The neck, the right shoulder, right arm, right hand. The lower back was not as bad at that time as the pains in the back of my neck and my head were.

Q Were they treating your back, also?

A Not really, sir. Not that much. Not that much.

Q All right. Now, as you kept going to this doctor or these doctors, what, if anything, happened with regard to your physical condition?

A It got worse.

Q In what way?

A My back, my lower back, became much, much worse. The headaches increased. I was getting headaches from the pains in the back of my head, the back of my neck.

MR. SCHULTZ: If your Honor please, may I respectfully object. We don't know what time.

THE COURT: Fix the time.

Q Can you tell me when the pains in your back started to get much worse?

A It was in three to four weeks after I first-- after the accident.

Q All right. While you were being treated by Dr. Urs, were you also being treated at a hospital?

A Yes, sir, two hospitals. I was going for physical therapy at St. Vincent's Medical Center in Staten Island, and Richmond Memorial Hospital in Staten Island.

Q Incidentally, prior to this accident, had you ever injured your back, your head, your neck, your arms, your legs or any part of your body in any accident?

A No, sir.

Q What was the state of your health prior to this accident?

MR. SCHULTZ: Objection, your Honor.

THE COURT: He said he's had no trouble with the

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injuries complained of. That's sufficient.

Q Had you had any illnesses or disease with regard to any --

A Would you please repeat that?

Q Have you had illnesses or disease to any parts of your body prior to this accident?

A Just normal childhood diseases of appendectomy --

THE COURT: All right.

MR. LASSOFF: At this point, your Honor, I would like to offer into evidence the hospital record of the St. Vincent's Hospital in Staten Island.

MR. LASSOFF: The Richmond Memorial Hospital in Staten Island.

MR. SCHULTZ: May I take a look at it again, please? I only saw these, your Honor, for the first time just before we started.

If your Honor please, I respectfully object to at this time for lack of foundation. Its admission is in August of '72, your Honor.

THE COURT: What foundation is missing?

MR. SCHULTZ: First of all, if your Honor please, this admission was necessitated as a result of the occurrence complained of.

THE COURT: The pre-trial order provides for

its admission. Without objection.

MR. SCHULTZ: I thought, sir -- I didn't prepare that pre-trial order.

THE COURT: I'm sorry, that is not my fault.

MR. SCHULTZ: I understand that, your Honor. It was my understanding of having read it that he would make an offer of that, but that there was--

THE COURT: It comes in.

xx (Plaintiffs' Exhibit 4 received in evidence.)

Q Did you continue after you went back to Dr. Spitz about a month after the accident, did you continue under his care?

A Yes, sir, I did.

Q Did he refer you to any other doctors?

A He did at a later time, yes, sir.

Q What doctors were those?

A Dr. Lanier in Brooklyn, sir.

Q Do you know what kind of doctor he is?

A He's an orthopedic surgeon, if I'm not mistaken.

THE COURT: Let's get some times in here.

Q Would that be in March of 1973 that you saw Dr. Lanier?

A Yes, sir, approximately then.

Q Besides Dr. Urs and Dr. Lanier, did you see other

specialists during that same period of time from the date of the accident until March of 1973?

A Yes, sir. I saw Dr. Frank whom Dr. Urs sent me to, and let me give you a time for that. I would say approximately September of '72. He's a neurosurgeon.

And I, after seeing him, I also saw a Dr. Moreno, who was a friend of someone that I knew who just suggested I might go see him. It was getting very bad at that time, the pain.

THE COURT: When did you see Dr. Moreno?

THE WITNESS: Right after I saw Dr. Frank, sir.

Q Did there come a time when you had a myelogram performed?

A Yes, sir.

Q Can you tell us when that was?

A January, '73.

Q Where was that myelogram performed?

A In Richmond, Virginia, at Richmond Memorial Hospital in Virginai.

Q Prior to having this performed in Richmond Memorial Hospital in Richmond, Virginia, were you supposed to have it done at Richmond Memorial at Staten Island?

MR. SCHULTZ: Objection, your Honor.

THE COURT: I don't understand that question.

Sustained.

Q Was there some reason that you went to this hospital in Virginia?

A Yes, sir, there was.

Q What was the reason?

A I was set up to have a myelogram at Richmond Memorial in Staten Island by Dr. Frank but at that time in December there was a flu epidemic, and they were taking all children and elderly people in first, because the flu epidemic was affecting them first and there was no room in the hospital to take someone in for a myelogram at that time.

The pain had become increasingly bad.

MR. SCHULTZ: If your Honor please, I am going to respectfully object.

THE COURT: Sustained.

MR. SCHULTZ: I move to strike.

THE COURT: You are asking when he went for a myelogram and why he went from New York to Richmond, Virginia.

Q Did you know someone in Richmond, Virginia, or did you just go out of the blue?

A No, sir, I knew someone.

Q Who did you know?

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A My cousin, Dr. Rosanelli, who is a gynecologist. One of his very good friends is a Dr. Rennie, who was a neurologist at Richmond Memorial in Virginia.

Q Did you have a myelogram performed in Richmond, Virginia, in Richmond Memorial?

A Yes, sir, I did.

MR. LASSOFF: I offer that hospital record in evidence, your Honor.

THE COURT: That's the one you just showed.

MR. LASSOFF: That's a different one, your Honor, that's the one in Staten Island.

MR. LASSOFF: Any objection?

MR. SCHULTZ: Yes, your Honor.

THE COURT: Same ruling.

MR. SCHULTZ: I have an objection, your Honor.

THE COURT: Yes?

MR. SCHULTZ: I believe it would be wiser to do it at the side bar.

THE COURT: All right.

(At the side bar.)

THE COURT: Yes?

MR. SCHULTZ: If the Court please, I was given that record about five minutes before we started this case. I had never seen it before.

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THE COURT: It's not my fault.

MR. SCHULTZ: I understand, your Honor.

MR. LASSOFF: Your Honor, may I say that Mr. Bayer has had these for over a year.

MR. SCHULTZ: In the short period of time that I went through these records, he was not admitted until January of '73 into that hospital, and there's apparently correspondence from doctors in there dated November of '72, and I don't know whether that is part of the hospital record or not, and I am suspect now owing to the fact that he tells me that his cousin is a doctor in that hospital.

THE COURT: That's why he said he went there. I will take it in. You can look at it over the lunch recess and see it.

MR. SCHULTZ: All right, your Honor.

(In open court.)

THE COURT: Go ahead.

(Plaintiffs' Exhibit 5 received in evidence.)

Q Following your examination by Dr. Lanier in March of 1973, can you tell me what doctor, if any, you saw next?

A Dr. Friedman.

Q Is that Dr. Arthur Friedman?

A Yes, sir.

Q Incidentally, did you just see Dr. Friedman again a week ago, a week from today, a week before today?

A Yes, sir, I did.

Q Incidentally, did there come a time when you moved to Florida?

A Yes, sir, there did.

Q Can you tell me when you moved to Florida?

A August 1st.

THE COURT: What year?

THE WITNESS: Yes, I'm getting to that. '73.

Q What, if anything, caused you to move to Florida?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Mr. Chiarello, on the date of this accident, were you married?

A Yes, sir.

Q What was your wife's name?

A Angela.

Q Did you have any children?

A Yes, sir.

Q Would you give me their names and ages?

A Their present ages, sir?

Q No, at the time.

A At the time of the accident? Tracy is a girl. She was five. James, a boy, he was nine. And Laura, a girl, she was ten.

THE COURT: How old?

THE WITNESS: She was ten, sir.

Q Did you own your own home in Staten Island at the time of the accident?

A Yes, I did.

Q Did you sell this house in order to move to Florida?

A Yes, sir, I did.

Q When you first moved to Florida, where did you stay?

A With my father.

Q Did there come a time when you purchased a home in Florida?

A Yes, sir.

Q When you moved to Florida, did you see any physicians in Florida?

A I beg your pardon, sir? I didn't hear you.

Q Excuse me. When you moved to Florida, did you see any physicians in Florida?

A Yes, sir, I did.

Q When for the first time did you see a physician

in Florida?

A In August I saw -- in August of '73 I saw a Dr. Samuel Leone.

Q Where was his office?

A In Hallendale, Florida.

Q How do you spell that?

A H-a--

MR. LASSOFF: L-e-o-n-e, your Honor, Samuel Leone, your Honor, I believe it is the same name as the borough president.

THE COURT: I don't know from borough presidents. What's the man's name?

THE WITNESS: Samuel L-e-o-n-e.

THE COURT: That's what I want to know. I am not interested in borough presidents, Mr. Lassoff.

MR. LASSOFF: I agree.

THE COURT: Thank you.

Q What sort of a doctor was Dr. Leone?

A He's an orthopedic surgeon.

Q Incidentally, did Dr. Leone practice medicine in Brooklyn, New York, prior to moving to Florida?

A Yes, sir, he did.

Q Did Dr. Leone send you to any other doctors?

A Yes, sir, he did.

Q Who did he send you to?

A Dr. Stephen Gervin. He is in Hollywood, Florida.

Q What kind of a doctor is Dr. Gervin?

A He's a neurosurgeon.

Q Did there come a time when you were admitted to a hospital and an operation was performed on you?

A Yes, sir.

Q When was that?

A December, '73.

Q Which hospital?

A Golden Isles Hospital in Hallandale.

Q Hallandale, Florida?

A Hallandale, Florida.

Q Can you tell me who performed that operation?

A Dr. Gervin performed the operation with an assist from Dr. Leone.

Q Can you tell me what part of your body they operated on?

A Yes, sir, my lower back.

MR. LASSOFF: At this point, your Honor, I would like to offer into evidence the hospital record of the Golden Isles Hospital, Hallandale, Florida.

THE COURT: Any objection?

MR. SCHULTZ: Yes, your Honor, I object.

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THE COURT: Same objection you have given before?

MR. SCHULTZ: By that you mean I am objecting to it coming in on the basis that there is no causal relationship, that is the basis of my objection.

THE COURT: Overruled. The pre-trial order dated May 5, 1975, provides for its admission.

(Plaintiffs' Exhibit 6 received in evidence.)

Q At the time you went to the hospital, the Golden Isles Hospital in Florida for this operation, prior to the operation can you tell me what, if anything, you felt?

A In the way of pain, sir?

MR. SCHULTZ: If your Honor please, I am going to respectfully object at this point. This is December of '73. As to what he felt should be taken subject to medical connection, at least.

THE COURT: He can tell us. You haven't done a good job in giving the chronology of this. He goes to see doctors, that's all we know he's doing.

MR. LASSOFF: I agree, your Honor. There are so many. I have to tie it together with the doctors I'm bringing. All I am asking now is how he felt before the operation.

THE COURT: Felt about what? An ingrown toenail?

Q What, if anything, bothered you before this

operation?

MR. SCHULTZ: Objection, it is December of '73.

THE COURT: I think you better bring him up to date as to his physical condition. All we know is he went to see some doctors. And the only specific thing you have asked him was way back in August of 1972 as to what he was being treated for by Dr. Urs and Dr. Spitz, period. That's where you end.

MR. LASSOFF: All right.

Q While you were being treated by Dr. Spitz, and prior to your going to the Richmond Memorial Hospital in Richmond, Virginia, can you tell me what, if any, parts of your body you had any difficulty with?

A Yes, sir.

MR. SCHULTZ: If your Honor please, I am going to respectfully object. The reason for it is, your Honor, is that it is now January of 1973. He is asking him to describe--

THE COURT: No, he's back in August.

MR. SCHULTZ: Now he's at January, '73.

THE COURT: I'm sorry, he is back in August when he was treated by Spitz. He went back to Spitz. I'm asking for chronolgoy.

MR. SCHULTZ: So the question was how did he

feel before -- just before he went to the hospital in Richmond, Virginia.

THE COURT: I'm sorry, he was asking him how he felt when he went to Dr. Spitz in August of 1973; the second time he went to Spitz.

MR. LASSOFF: August, '72, your Honor.

THE COURT: '72.

Q Tell us how you felt when you went back to Spitz.

A I had severe pain in my head, my neck, my right arm, my right hand, my lower back. I was having trouble with bowel movements and I was having trouble with the act of sex, with my wife.

Q Can you tell me, were you having pain in your back at that time?

A Yes, sir, I was.

THE COURT: Let's get specific. You went back to Spitz in August of 1973. How long -- did you go to Dr. Spitz for these things that you claim ailed you?

A I went to Dr. Spitz regularly until I left for Florida.

THE COURT: When you say regularly, what do you mean by regularly?

THE WITNESS: Once a week, once every other week.

THE COURT: Once a week and once every other week

from August until when?

A Until I left on August 1st of 1973. I continued--

THE COURT: So for a whole year you went to Dr. Spitz either weekly or bi-weekly?

THE WITNESS: Yes, sir, that's correct.

THE COURT: For these ailments which you claim were the result of this accident?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q The trouble with your back that you have told us about, what kind of pain did you have there, back in August of 1972?

A Severe pain in the lower part of the back coming into the right buttocks, down the right leg into the right foot.

Q Did you --

A Deadness in the right foot, some of the toes and the leg on top of the leg.

Q Did the pain that you had when you went to Dr. Spitz in August of 1972 abate, remain the same or get worse?

A It got worse, sir.

Q At the time you went for this myelogram in Richmond, Virginia, in January of 1973, would you tell us

about the pain in your back at that time?

MR. SCHULTZ: I respectfully object, your Honor.

THE COURT: Overruled.

A It was extremely bad.

Q In what way?

A In that it had gotten worse in that the pain itself had gotten worse, and that the leg had gotten worse. As a matter of fact, it would not stay up under pressure. It collapsed.

THE COURT: Did Dr. Spitz send you to this hospital for a myelogram?

THE WITNESS: No, sir, he didn't, sir.

THE COURT: You did this on your own?

THE WITNESS: Yes, sir, I did.

Q Did some doctor send you to the hospital, Richmond Memorial Hospital, in Staten Island for a myelogram?

A Dr. Frank had set up the appointment. As I mentioned before, Dr. Frank had set up the appointment to go there.

Q And Dr. Frank is a neurosurgeon?

A Yes, sir, he is.

Q What, if anything, with regard to your physical condition eventuated the operation of December, '73?

MR. SCHULTZ: Objection, your Honor.

THE COURT: You've got us back in August now. Will you please do it step by step? Or I am going to start sustaining his objection.

MR. LASSOFF: All right.

THE COURT: You haven't proven at this date what he went into that hospital for had anything to do with this accident, out of this witness' mouth.

Q Incidentally, following this accident in June, 1972, have you ever been involved in any other accident where you injured any other part of your body?

A No, sir, I haven't.

Q After the myelogram in January of 1973, can you tell me what, if anything, occurred with relation to the pain you were feeling in your lower back?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A It got increasingly worse.

Q When you say increasingly worse, in what way did it get increasingly worse?

A When I attempted to walk, it was very bad. Sitting caused me great pain. Most of the time it was lay in bed or just walking slowly or intermittently sitting and walking.

Q All right. Now, had you been advised to have this

operation prior to December of 1973?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained. You have got him in August -- at least you've got him after a myelogram that the pain is increasingly worse. Ask him what happened.

Q What happened with regard to your physical condition between the time that you had the myelogram and the time you went for surgery.

MR. SCHULTZ: Objection, if your Honor pleases.

THE COURT: Overruled.

A It had become much worse. I had -- they had wanted me to go --

MR. SCHULTZ: I move to strike, if your Honor please.

THE COURT: Sustained. What doctors did you go to see, if any, after the myelogram?

THE WITNESS: I went to see Dr. Lanier in Brooklyn. Dr. Lanier.

THE COURT: What did you complain to him about?

THE WITNESS: Dr. Spitz sent me to him and sent him a report, and I complained about the pain in the lower back, the neck, the head, the inability or the hard time I was having going to the bathroom and the problem of sex. I explained all of this to Dr. Lanier.

THE COURT: How many times did you see Dr. Lanier?

THE WITNESS: Once, sir.

THE COURT: Once?

THE WITNESS: Yes, sir.

THE COURT: What did you do after seeing Dr. Lanier? Did he give you any treatment while you were there?

THE WITNESS: No, sir, he didn't.

THE COURT: What did you do after that?

THE WITNESS: He suggested I have the operation.

MR. SCHULTZ: Objection, move to strike it, if your Honor please.

THE COURT: Overruled.

THE WITNESS: He suggested I go and have an operation.

THE COURT: Did he send you to a doctor?

THE WITNESS: No, sir, he didn't.

THE COURT: Did you go back to Dr. Spitz?

THE WITNESS: Yes, sir, I did.

THE COURT: What did he do for you?

THE WITNESS: Just what he could do. He couldn't--

MR. SCHULTZ: I move to strike.

THE COURT: What did he do for you?

THE WITNESS: He gave me injections of -- he gave

me injections and that was about all he could do for me. There wasn't much else he could do.

MR. SCHULTZ: Objection, move to strike.

THE COURT: Sustained. You don't know what he could or couldn't do for you. You are not a doctor. All you can do is tell us what he did?

THE WITNESS: All right, sir.

THE COURT: Then you continued with Spitz from March of 1973 to August of 1973?

THE WITNESS: Yes, sir, when I left for--

THE COURT: Did you see any other doctors in that time?

THE WITNESS: I don't believe so, sir.

Q Dr. Friedman, oh, I'm sorry. Dr. Friedman. I did see Dr. Friedman. I did mention that before, I'm sorry.

THE COURT: How did you get to Dr. Friedman, did Spitz send you to him?

THE WITNESS: No, sir. What had happened, at the time I had been in touch with Mr. Lassoff and I didn't feel that he was conducting things speedily enough --

MR. SCHULTZ: If your Honor please, I move to strike it, please.

THE COURT: Sustained. Strike it. It has nothing

to do with this lawsuit. You went to speak to Mr. Lassoff, your lawyer.

MR. LASSOFF: No, your Honor, thats not what he's saying. He went to see another lawyer, if your Honor please.

MR. SCHULTZ: If your Honor please --

THE COURT: You say you went to Dr. Friedman.

THE WITNESS: Yes, sir.

THE COURT: Who sent you to Dr. Friedman? Just the name of the person.

THE WITNESS: Mr. Heckerling, attorney.

THE COURT: Is he a doctor?

THE WITNESS: He's an attorney.

THE COURT: He sent you to a Dr. Friedman?

THE WITNESS:Yes, sir.

THE COURT: When did you see Dr. Friedman ?

THE WITNESS: I can't give you the date. I don't know. I'm confused. I don't know.

THE COURT: How many times did you see Dr. Friedman?

THE WITNESS: I saw Dr. Friedman once, sir.

THE COURT: What did Dr. Friedman do for you?

THE WITNESS: He did a physical examination, X-rays and he also said "Have the operation."

MR. SCHULTZ: Move to strike it, your Honor.

THE COURT: Overruled. So you went to Dr. Friedman?

THE WITNESS: Yes, sir.

THE COURT: And you continued with Dr. Spitz until you left here in August?

THE WITNESS: Yes, sir.

THE COURT: Were you complaing to Dr. Spitz all through this time about your back, your head, your arm, your neck?

THE WITNESS: I had told Dr. Spitz about it, yes, sir. I was complaining to him.

THE COURT: And you left then?

THE WITNESS: Yes, sir, I did.

THE COURT: You went to Florida?

THE WITNESS: Yes, sir.

THE COURT: The first doctor you saw in Florida was Dr. Leone?

THE WITNESS: Yes, sir, that was him.

THE COURT: When you went to see Dr. Leone, what did you tell him?

THE WITNESS: Of the severe pain in my neck and my head and my right arm and how the pain had gotten much worse in my back and legs.

THE COURT: What did Dr. Leone do for you?

THE WITNESS: Right leg. Dr. Leone gave me physical therapy after a complete examination and X-rays. Gave me physical therapy.

THE COURT: All right. How long did you continue going to Dr. Leone and receiving therapy?

THE WITNESS: Up until -- I saw him in approximately three months, sir.

THE COURT: So you saw him for three months after August?

THE WITNESS: Yes, sir.

THE COURT: Until -- that would make it some time around November or December of 1973?

THE WITNESS: Yes, sir. I also saw--

THE COURT: How often did you see him for three months?

THE WITNESS: Once a week, sir.

THE COURT: All right. Did he send you to any other doctor?

THE WITNESS: Yes, sir, Dr. Stephen Gervin.

THE COURT: How do you spell that name?

THE WITNESS: G-e-r-v-i-n.

THE COURT: What did Dr. Gervin -- what did you tell Dr. Gervin?

THE WITNESS: The same thing I had told Dr. Leone.

THE COURT: What did Dr. Gervin do for you?

THE WITNESS: He did his own physical examination, had more X-rays taken.

THE COURT: How many times did you see Dr. Gervin?

THE WITNESS: Approximately three times prior to the operation in December.

THE COURT: Did he put you in the hospital?

THE WITNESS: Yes, sir, he was the one that finally convinced me I had to go into the hospital.

THE COURT: And you went into the hospital?

THE WITNESS: Hospital, yes, sir.

THE COURT: All right. Go ahead now.

MR. LASSOFF: Thank you.

THE COURT: I am just the judge, you know, I'm not the lawyer. You better come in here better prepared. I don't think it is laughable.

MR. LASSOFF: I'm sorry, your Honor.

THE COURT: This man has a claim here, he is entitled to be represented by counsel who knows how to try a case.

MR. LASSOFF: I know. All right.

Q How long were you in the Golden Isles Hospital?

A 13 days.

Q Can you tell me, after you came out of sedation, after the operation, what, if anything, your condition was?

A It was the worst pain I've ever felt in my life.

Q In what way?

A I just -- everything hurt. The whole body hurt. Everything, my leg was extremely bad. Very, very bad. I had -- I don't know if I am allowed to say it, I had asked them to cut it off.

Q Cut what off?

A My leg off because the pain was so bad.

Q Did there occur some scene in the hospital itself with regard to your physical condition a day or two after this operation?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, sir, I can answer? Yes, sir. There did.

Q Can you tell me what that was?

A Yes, sir, they had -- it was the first night off of morphine, and on Percodan, and I had horrible nightmares during the night and I attempted to get out of bed and I pulled the intravenous loose and I was hanging over the end of the bed.

MR. SCHULTZ: If your Honor please, I respectfully move to strike it.

THE COURT: Overruled. He is testifying what happened. You can cross-examine him.

A And the nurse came in and pushed me back into bed.

Q When you left the hospital, was there any change in your physical condition with regard to the pain in your back?

A Not immediately after leaving the hospital. I left the hospital with a walker and I went home and I stayed approximately a week in bed. I had an appointment at the end of that week to go back and see Dr. Gervin, and the pain was still very bad. Of course, that's recuperation period. After that the pain did ease off within about three weeks.

Q Did the pain come back with any severity after that three weeks?

A Yes, sir, it did.

Q Tell me how it was when it came back.

MR. SCHULTZ: I respectfully object, your Honor.

THE COURT: Why? He's testifying as to how he felt. He can testify as to that.

MR. SCHULTZ: If your Honor please, we are now in December of 1973 or January of '74.

THE COURT: All right.

MR. SCHULTZ: I believe, your Honor, it is incumbent

that there has to be some foundation such as causal relationship. Either take it subject--

THE COURT: He is testifying what he went through. I assume a doctor will take the stand and testify to the relationship. You can't do both. All he can tell you is how he feels.

MR. SCHULTZ: I'm objecting, your Honor--

THE COURT: Overruled.

MR. SCHULTZ: -- on the basis that--

THE COURT: Do you want the doctor on first or do you want the witness on?

MR. SCHULTZ: Subject to connection, your Honor.

THE COURT: Obviously subject to connection.

Q Do you remember the question, Mr. Chiarello?

A No, sir, I don't.

MR. LASSOFF: Can you read it back to him? I don't remember, either.

(Read)

Q You say after three weeks the pain subsided. Did it return with any force later?

A Yes, sir, it did.

Q When?

A Within a week or two after my getting up and walking around. That would put you somewheres in February,

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early February.

Q At that time did you see any doctor about it?

A I went back to Dr. Gervin and saw him.

Q What did he do?

A He suggested --

Q What he did, not what he suggested.

A All right. He ordered an electronic device that interrupts the pain from getting to the brain.

Q What does that electronic device look like?

A It is a small box like one of those peeperoboxes that a doctor would wear on here. And it has two wires coming from the bottom with two knobs on the box. The two wires are attached-- run around to your back and they're attached to small black plastic light pads. Then you spray benzene on your back to make them adhere and then tape them onto either side of the spine -- is where I had it. At that time you turn the device on and it sends an electrical impulse into the back, and you can control the amount of electricity plus the rate at which it goes into the back, the pulsating rate at which it goes into the back. That is supposed to interrupt--

Q Did you get that machine and did you use that machine?

A Yes, I did.

Q What happened when you first got the machine?

A I put it on and it worked significantly well on the pain as it was at that time. The only drawback to it was if the pads lifted from the skin it forms an arc between the skin and the pad burning the skin.

Q All right. Did there come a time when this machine didn't work any longer?

A Yes, sir, there did.

Q When was that?

A Within, I would say, a month or two.

Q What did you do at that time?

A I was still seeing the doctors.

Q Dr. Gervin and Dr. Leone you are talking about?

A Yes, sir.

Q All right. What did they do, if anything?

A Dr. Leone was giving me physical therapy, that is, electrical treatment and heat, wet heat, at the same time. Also giving me injections.

Q What part of your body?

A To my lower back.

Q Did there come a time when you were admitted to another hospital?

A Yes, sir.

Q Do you remember when that was?

A October, 1974. I hope that's right.

Q What hospital was that?

A Hollywood Memorial, in Hollywood, Florida.

Q Who put you in that hospital?

A Dr. Gervin.

Q Was there some procedure performed on you in that hospital?

A Yes, sir. It is called a rhizotomy.

THE COURT: We will adjourn for lunch. Please return at 2 o'clock.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(Jury present.)

MR. LASSOFF: Your Honor, with the Court's and Mr. Schultz's permission, I have Dr. Spitz in court. Since we finished with his part of the testimony, medically for his part of the case, I would like to put him on.

THE COURT: Is that agreeable?

MR. SCHULTZ: Yes, I have consented as long as the doctor is here to take him out of turn.

THE COURT: All right.

L. J A C K S O N S P I T Z, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LASSOFF:

THE COURT: You may proceed.

Q Dr. Spitz, are you a physician duly licensed to practice medicine in the state of New York?

A I am.

Q Do you maintain an office for the practice of your profession?

A I do.

Q Where is your office located?

A 902 East 86th Street, Brooklyn.

Q Would you tell the jury your professional background, education, standing?

A I graduated from the College of Medicine in 1939 in Edinburgh, Scotland. I'm a general practitioner.

Q Did there come a time when you treated Mr. Thomas Chiarello, jr., for any injuries sustained in an accident?

A Yes, there was.

Q When was the first time that you saw Mr. Chiarello?

A July 3rd of 1972.

Q At the time you saw him, did you obtain a history?

A Yes, I did.

Q What history did you obtain?

A He said that on June 30, '72, he was driving a car that was struck by a bus in the rear forcing him to strike a car in front of him. And he got a severe jolt and he injured his neck and back.

Q Did you examine him on that day?

A I did.

Q What did your examination consist of?

A I found forward flexion of his neck was limited and painful. He had a marked spasm of his paravertebral muscles of his lower back. Also forward bending of his body trunk was limited to about 45 degrees. The patient also said--that's what I found.

Q You started to say something about the patient telling you something.

A Well, if you ask me, I'll tell you.

Q I'm asking.

A Yes, he said that his neck and back hurt a lot.

Q Based on your examination, did you come to a diagnosis?

A Yes, I did.

Q What was your diagnosis?

A He had acute tortocollis, which is a sprain of the cervical spine, the neck spines, and he also had severe low back derangement at that time.

Q Doctor, did you see Mr. Chiarello again after that?

A Yes.

Q When was the next time?

A On July 5, '72.

Q Did you see him after July 5th?

A Yes.

Q When was the next time after July 5th?

A August 6th of '72.

Q When you saw him on August 6, '72, what, if anything, was he complaining of?

A I don't have here what he was complaining of other than I gave him therapy at that time. It's not written down.

Q I see. When did you see him--

THE COURT: I gather, doctor, you have no independent recollection, aside from what is in your notes?

THE WITNESS: I have. I saw him quite a bit. I have--if you want, I can tell you.

THE COURT: I'm not the lawyer.

Q If you remember, doctor, you can tell us. If you don't, don't.

A On the 5th of July, we go back a bit, he complained of pains in his neck and his back, which was the second visit after the original one.

Q Going on to August, doctor, do you have any independent recollection, aside from your records, of what treatment you performed on August 6th?

A Yes, I gave him physiotherapy, which is infra-red and massage.

Q To what areas?

A To his neck and his lower back.

Q When did you see him after August 6th?

A Then it was on the 13th, 8/13/72. I repeated the same thing I had done prior to that. On 8/20, the same thing. At that time my records state that, "I can't sit too long, I get pains in my back and my legs feel weak." That's what he told me.

Q When after that?

A On January 6th of '73.

THE COURT: Did you see him from August--

THE WITNESS: To January, I didn't see him at all.

THE COURT: January what?

THE WITNESS: 6th.

THE COURT: '73. Go ahead.

Q What does your record reveal?

A At that time he complained of pains in his back and he said that there was a question of his--of him being impotent and he also had pains in his neck. So I advised him to continue with physiotherapy and advised him getting vitamin E by injection, 200 internal units once weekly.

Q All right. Did you obtain an interval history of where the man had been treated during the time he was not seeing you?

A Yes, he--

MR. SCHULTZ: Objection as to form, your Honor. It assumes there was some treatment.

THE COURT: True. Reframe your question.

Q To your knowledge, doctor, was this man being treated elsewhere during the time that he was not seeing you?

A Yes.

Q Do you know where he was being treated?

MR. SCHULTZ: Objection, your Honor.

THE COURT: True. To his knowledge, how would he know, he wasn't there.

THE WITNESS: I have a report from another doctor.

MR. SCHULTZ: So what?

THE COURT: That's something independent of this doctor.

MR. LASSOFF: All right.

Q Doctor, after January 6th, with what frequency did you see Mr. Chiarello?

A Once weekly.

THE COURT: Let's have the dates.

A January 13, '73; January 20, '73; February 10, '73; February 17, '73; Febraury 24, '73; March 3--these are all in '73--March 3, March 10, March 17, March 24, March 31, April 21, April 30, May 5, 12, 26; June 4, 9, 16, 23.

THE COURT: Wait a second. You're going too fast for me.

A I missed two. Let's go back to April. April 7, 14, 21, 30.

THE COURT: Yes? And May?

A May 5, 12, 26; June 4, 9, 16, 23; and July is the last time I saw him, is the 7th, 14th, 21st and 30th.

THE COURT: All right.

Q Would I be correct in stating that since July--

THE COURT: Why don't you just ask questions.

Q Doctor, you have not treated Mr. Chiarello at all after July 30, 1973, have you?

A No, not at all.

Q During these weekly visits that Mr. Chiarello went to your office from January 6th through July 30th, what treatment was he receiving from you?

A He was receiving physiotheraphy, vitamin E injections and I also checked him physically, like his blood pressure, his weight, his urine for sugar, and predominantly physiotherapy to the regions that he complained about, specifically his neck and his lower back.

Q What is the vitamin E that you were giving him for?

A It's alpha tocopheral. It's supposed to help impotence in some people. Because he complained so bitterly and because he was a young man, I felt it was worthwhile giving it to him to see if it would produce beneficial effects.

Q During the course of your treatments to Mr. Chiarello, did you send him to any other doctors?

A Yes, I sent him to a Dr. Lanier for consultation.

Q What kind of a doctor is Dr. Lanier?

A He's an orthopedic specialist.

Q Doctor, I want you to assume that on June 30, 1972,

while Mr. Chiarello's car was stopped on an entranceway to the Bayonne Bridge, he was struck in the rear by a bus and pushed forward into a car approximately ten feet in front of where his car was stopped; that the seat of his car was broken and he was flung down backwards and then tossed up forwards again draped over the steering wheel when he struck the car in front of his car; and that he came to you on Monday, July 3, 1972, and that you found him to be suffering with a low back derangement and acute tortocollis.

In your opinion, doctor, with reasonable medical certainty, was the accident, as I described it to you, a competent producing cause of these injuries?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A It was.

Q Doctor, during the period of time that you were treating Mr. Chiarello, did you make notes or express an opinion as to whether or not Mr. Chiarello was disabled?

A Yes, I did.

Q What was your opinion at that time?

A On July 30, '73, which was the last time he was in to see me, his back symptoms were still present. My prognosis, the outlook, as far as I was concerned, was poor, and that I felt he was totally disabled and in my own mind

I wrote down a question mark that he may have a herniated disc. That means a disc, that lies between the lumbar spine, has pushed itself forward which would need some help or correction later on.

Q At the time you last saw him, doctor, were you aware that a myelogram had been performed at a hospital in Richmond, Virginia?

A Yes, I knew about that because it happened in between, I believe.

Q Doctor, in your opinion, with reasonable medical certainty, were the injuries that you found a competent producing cause of the disability that Mr. Chiarello was under while he was being treated with you?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, it was a competent producing cause.

Q When you examined Mr. Chiarello on July 3rd of 1975, did he appear to you to be in pain?

A I never saw him in '75.

Q '72, doctor, excuse me.

A Yes, he was in pain. He was in pain from my physical findings.

Q Did you prescribe any medication?

A Yes, I did.

Q What was that?

A I put him on Robaxisal. That is a pain killer and a muscle relaxant as well, and advised him to get a plastic neck collar. Those are the two predominant things I put him on.

Q During the course of your treatment, did you prescribe other medication for Mr. Chiarello?

A None other than his vitamin E injections, and continuing of the physiotherapy.

Q Do you know where he is receiving this physiotherapy?

A You mean elsewhere?

Q Yes.

A No, I have no idea. Unless, you know--

THE COURT: Did you administer physiotherapy?

THE WITNESS: I did, yes.

Q Doctor, I want you to further assume that the myelogram performed at the Richmond Memorial Hospital in January of 1973, which is in evidence, was positive and indicated a herniated disc at L-4, L-5, and that the disc was eventually removed in December of 1973.

In your opinion, doctor, with reasonable medical certainty, were the injuries you found Mr. Chiarello with, and the accident, the competent producing cause of that herniated disc?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Doctor, in your opinion, prior to discharging of Mr. Chiarello, did you feel that he had a herniated disc?

MR. SCHULTZ: Objection, Your Honor.

THE COURT: He's already said he had a question mark.

MR. LASSOFF: No further questions, your Honor.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q May I see your records, Dr. Spitz, please?

A (Handing.) Do you want the report of the other doctors as well?

Q May I see whatever you have there, please?

A Sure.

MR. SCHULTZ: May I have just a moment, your Honor, to look at these, please?

THE COURT: Sure.

MR. SCHULTZ: If the Court please, may I have this record marked as Defendant's Exhibit A for identification, please.

xxxx (Defendant's Exhibit A marked for identification.)

Q Doctor, you told us that you went to the--what was it--the University of Edinburgh? When were you licensed to practice medicine in this state?

A The same year, 1939.

Q Do you specialize in any field at all?

A No, general practice.

Q Are you a diplomate in internal medicine?

A I'm not.

Q Do you have any relationship with any hospitals?

A Yes.

Q Which ones?

A Leffert's General Hospital, Brooklyn; Flatbush General Hospital, Brooklyn.

Q Do you have any membership as a diplomate in any field?

A Not at all.

Q Would you be good enough to tell us what a diplomate is?

A A diplomate is a doctor who takes additional training beyond his original internship for a period of--depending upon the requirements for whatever specific field of medicine he wants to be a specialist in. Some take three years, some take five years. And they're--diplomates are considered specialists.

Q There is such a thing as a diplomate in internal medicine, is there not?

A Yes, there is.

Q That is the diagnostic study, is it not?

A It's internal medicine, yes, you're correct.

Q Dr. Spitz, had you known Mr. Thomas Chiarello at any time before he came to see you?

A Yes, I did.

Q When did you first know Mr. Chiarello?

A I knew Mr. Chiarello--I didn't know him professionally, I knew him--I was a patient in a hospital myself.

Q Sir, can you tell us when you first knew Mr. Chiarello?

MR. LASSOFF: I think he's trying to.

A Maybe two years prior to the onset of this.

Q Had you known any member of his family before this?

A Yes, sure.

Q Who did you know? Was it Gus Chiarello?

THE COURT: Wait. This word "know" seems to be bothering the doctor. I understand. Know how, socially, professionally?

MR. SCHULTZ: Either way, your Honor.

A Yes, I knew his father-in-law.

Q Who was that?

A Mr. Frank Cardillo.

Q Did you know or have any acquaintance with the

members of the Chiarello family?

A No, I don't know the other Chiarellos.

Q You had never treated any of the Chiarellos prior to this?

A No.

Q And you didn't know them socially?

A I knew them socially only through the father-in-law.

Q That was Mr. Cardillo?

A That's right.

Q Was he a patient of yours?

A Yes.

Q Doctor, I want you to look at this Defendant's Exhibit A, which is your card that you brought here. Was this card made up from original records or is that the original record?

A This is my original.

Q That record, you say, was made each time this man came in to your office?

A I always do that, yes.

Q Is that the one, though, sir?

A This is the one, yes.

Q And you made that each time he came in?

A Yes.

Q I assume, sir, that over the period of July of '72 and until your last visit you always used the same pen, did you?

A I don't specifically know I used the same pen, but I would look and see if it was the same pen if you want me to.

Q All right.

Sir, when you discussed tortocollis, is that a field of medicine that pertains to the field of orthopedics?

A Predominantly, yes.

Q And you're not an orthopedist, are you, sir?

A No, I'm not.

Q You don't have any specialty in orthopedics, do you?

A I don't have.

Q Sir, when you spoke of a sprain or a spasm of the paravertebral muscles--is that correct?

A Yes.

Q That's what you said. That's also in this field of orthopedics, isn't it?

A No, that's in the field of medicine. A doctor would recognize that.

Q The treatment of it, sir, is that an orthopedic specialty?

A It can be treated by a doctor of medicine or an

orthopedist equally.

Q Where did you find this spasm?

A He had spasm of the paravertebral--those are the muscles--

Q Where, what portion of the body?

A His lower back.

Q When you say the lower back, how many thoracic vertebrae are there, sir?

A Twelve.

Q How about thirteen?

A Twelve.

Q How many lumbar vertebrae are there?

A Five.

Q And, sir, now, these paravertebral muscles, do they attach to the transverse processes?

THE COURT: You're using highfalutin language. I don't think any of the jurors know what you're talking about. So what's the value of the examination?

MR. SCHULTZ: I want to find out, sir, whether--first I want to go over his capability of recognizing this, sir, and whether it is within the field--

THE COURT: The jury won't know what you're talking about unless you have it defined.

MR. SCHULTZ: If I may, your Honor, I will produce

other doctors that will help.

THE COURT: But the jury don't know now what you are talking about. You are using technical language.

MR. SCHULTZ: All right, sir.

Q Doctor, do you know the names of the muscles that you say were in spasm?

A Yes.

Q Do you know to which portions of the spine they're affixed?

A Yes, I do.

Q Sir, were you able to observe these muscles?

A Yes, I saw it in spasm, that's correct.

Q Sir, did you take any x-rays?

A I--my card reflects I advised x-rays but none were taken.

Q Did you take any x-rays?

A I took no x-rays.

Q You saw no x-rays?

A I saw no x-rays, no, I did not.

Q Sir, what is your definition of a tortocollis?

A A tortocollis implies painful spasm of the cervical spinal muscles. Those are the muscles in the back of the neck that are attached to the spine of the neck.

Q Do you know, sir, that in January and November of

1972--I want you to look at this record, sir, in the Richmond Memorial Hospital. That record, sir, there. Tell me--

THE COURT: Is that a record in evidence?

MR. SCHULTZ: Yes, sir.

THE COURT: Then designate for the record what its number is.

MR. SCHULTZ: Yes, sir.

Q May I have this a minute, doctor?

A Sure.

MR. LASSOFF: Your Honor, please, to correct the record, he said in January and November of 1972. I think he means January of '73.

MR. SCHULTZ: No, no.

THE COURT: Let's find out which--

MR. SCHULTZ: This is Exhibit number 5, your Honor, which is the Richmond Memorial Hospital in Virginia. His admission was in January of '73.

THE COURT: All right.

MR. SCHULTZ: However, there's a letter dated November of 1972 or which is a portion of that record, and I'm asking--

MR. LASSOFF: I agree. I'm just saying you said he was admitted in January of '72.

MR. SCHULTZ: '73. There's a letter there or a

report dated November, 1972.

MR. LASSOFF: Okay.

Q I'm asking the doctor to look at that.

THE COURT: Do you want him to read the whole thing?

A Excuse me, counsel, which one do you--

Q Read just that page and the half a page thereafter.

A This page?

Okay.

Q Now, doctor, in that record that I just gave you there, is there any mention of injury to the back?

A It says here, "The patient noticed soreness and pain in his neck, back and head and consulted his physician as a result of it."

Q That's the history. I'm talking about what they found there.

A I'll be with you in half a second.

No, they mention nothing--apparently there was no examination of this person's lower back on this sheet of paper.

Q At that time, sir, in November of 1972, his principal complaints were to his neck and his shoulder and his hand; isn't that true?

A No, he also complained about his back. He said he had soreness in his back as well.

Q The principal complaints in that report, though,

pertain to the neck and the shoulder and the arm, do they not?

A The principal findings pertain to it, but not the complaints.

Q The principal findings, then. And they found--

A They mentioned nothing. They didn't--

MR. LASSOFF: If your Honor please, we seem to be interrupting.

THE COURT: The doctor says the report doesn't show any report of the back.

Q Doctor, as a medicine man, did you conduct a physical of this man?

A Yes, I did.

Q Did you take a history as to his past condition?

THE COURT: Past condition when, when he first went to him on July 3rd?

MR. SCHULTZ: Yes, sir.

A The only thing I inquired about was his blood pressure and his heart and that's about all.

Q Sir, has he had a long history of hypertension?

A Yes.

Q Sir, what is hypertension?

A High blood pressure.

Q Sir, did you ever take his blood pressure?

A I did.

Q Did you record it here?

A It is on the other side.

Q When did you take it for the first time?

A When he first came.

Q Did you record it on your first--

A No, I did not.

Q You didn't record it on your first visit?

A No, I did not.

Q Did you record his weight on the first visit?

A I did not.

Q It was only, sir, until sometime in April of '73 that you recorded his blood pressure.

A That's correct.

Q And you treated him from July of '72 into April of '73 without recording his blood pressure.

A Well, there's a reason for it.

Q Sir, did you? Isn't that the fact?

A That's the fact.

Q Sir, what was his weight in July of '72?

A I didn't record it so I don't know. But I knew he was over 250.

Q So when you saw him in July of '72, you had a man who had hypertension, right?

A Correct.

Q High blood pressure.

A Correct.

Q Was he obese?

A Correct.

Q That's overweight, isn't it?

A correct.

Q Sir, did you know that in the hospital record they had him sent to a medical doctor for a medical work up?

A I saw that, sir.

MR. LASSOFF: If your Honor please, we're talking about a hospital record months afterwards. How could he possibly know that?

THE COURT: You keep skipping around. You're back in July or back in November?

MR. SCHULTZ: Sir, this is in January--

THE COURT: Let the jury understand what you're talking about. You're talking about when this doctor first saw this man in July of '72, and that time, I gather, that the doctor says he was suffering from hypertension and was obese.

Now, if you want to go beyond that, specify it so we know what you're talking about.

MR. SCHULTZ: All right, sir, I will accept that, your Honor, sir.

Q You were treating this man in January of '73, were you not?

A Yes.

Q And you treated him up until July of '73?

A Yes.

Q Did you know that there had been a medical work up by another doctor?

A Yes.

Q Did you know that he had gone to a doctor in Richmond, Virginia, for this medical work up?

A Yes.

Q Did you know that that doctor indicated that this man had a long history of hypertension?

A We said that, yes.

Q Did you know that?

THE COURT: He's already said yes.

A We said that, yes.

Q Did you give him any medication for hypertension when you treated him?

A No, I did not.

Q What was his blood pressure in July of '72?

A If I remember correctly, my card reflects that he had 150 over about 90.

Q Sir, I said in July of '72.

A Oh, July of '72? I don't know. I don't have it written down. I don't know.

Q You didn't think that was important for this man's medical history?

A His sole--he came to me with a strong complaint about pains in the back of his neck and his lower back.

Q Doctor, in the overall treatment of a patient, if the patient has hypertension and he's overweight, doesn't that suggest to you that he might be a problem for cardiac problems or vascular problems?

A Yes.

Q Sir, in the overall treatment of a patient, shouldn't good medical practice dictate, sir, that you record or keep a record of his blood pressure on the occasions that you see him faced with that knowledge?

A What you're saying is--

Q Sir, just answer.

THE COURT: Wait a second, wait a second. The doctor is trying to say the man came in and says he has a bad neck and he wants his neck treated. Now you're questioning of the doctor is if a man comes in and tells you his neck hurts as a result of having been in an accident, do you also treat him for hypertension? Is that your question to the doctor?

MR. SCHULTZ: My question, sir:

Q Isn't that important in evaluating his condition?

MR. LASSOFF: That is a question, doctor.

A Not too strongly.

Q All right. Now, doctor, will not, sir, an overweight condition cause back pain?

A It can agravate a preexisting back pain, yes.

Q Will it not cause it, too, sir?

A Can it cause it? In some individuals, yes.

Q In other words, obesity and overweight can result in a back condition?

A I can say no, because you see very heavy wrestlers and they've got perfect backs and they're big fellows.

Q Doctor, have you testified before?

A Yes.

Q You've testified on several occasions, haven't you?

A No.

Q How many times?

A The last time about eight years ago.

Q And before that?

A Ten years ago.

Q Doctor, back to the obesity, sir. Sir, isn't it true that obesity is a factor when evaluating a back condition?

A Obesity is a factor if a back condition is present, obesity should be controlled.

Q Will it not affect--

A It will help, yes.

Q It has an effect on a person's back, doesn't it?

THE COURT: Wait. Are you trying to ask the doctor whether obesity will create a back condition where none existed before? Or will obesity affect a back condition which already exists?

MR. SCHULTZ: I will ask it both ways, your Honor.

Q Dr. Spitz, will obesity be a competent factor in producing a back condition?

A In the majority of cases, no.

Q In some cases it will, though?

A It's a possibility.

Q Yes. And, sir, there's no question that obesity will agravate and worsen a back injury, isn't that true?

A That's true.

Q Sir, isn't it true that obesity and hypertension, high blood pressure, will have an effect on a person's life expectancy?

A That's true.

Q Sir, will it not have an effect of lessening one's life expectancy?

A That's true.

Q And this man, as you later learned, had a long history of hypertension, isn't that true?

A That's true.

Q And you found him to be obese, isn't that true?

A Correct.

Q Did you find, sir, that he was also a heavy cigarette smoker?

A I didn't know about that.

Q I want you to look at this record, sir.

A I take your word for it. If it is there, I believe it.

Q I want you to look at this and tell us, how many packs of cigarettes did he smoke a day?

A Three.

Q Now, sir, would you say that the smoking of three packages of cigarettes, high blood pressure and obesity would have an adverse affect on a person's life expectancy?

A Yes, it would.

Q Sir, did you know that his family had a history of cardiovascular disease?

A I didn't know that.

Q I want you to look at this and see if that is true.

A This is the comments they make here--

Q Sir, is it what they found? Was that part of the hospital record?

MR. LASSOFF: Is that what they found or what they reported?

A This is their comments.

Q Is it part of the hospital record put into evidence by the plaintiff?

THE COURT: I don't care whether it is part of the hospital record. I want to know what it is. Did they find--

A It says here he has a strong family history of hypertension. Now, it goes on, nothing further about the cardiovascular status, which means the heart and blood vessels. Then, as a comment, they remark, cause of his obesity, a strong family history of hypertension and cardiovascular disease, et cetera, et cetera, et cetera, there's nothing in the previous history back here that talks about his family's cardiovascular status.

THE COURT: What is your question?

Q Now, doctor, does this hospital record indicate that his family had a history of cardiovascular disease?

MR. LASSOFF: Objection, your Honor.

A It's not there, it doesn't say. It's just comments someone made without even finding out about it.

Q But is it in the record?

THE COURT: Wait. If it is in the record, it doesn't mean anything unless they knew it to be true.

MR. SCHULTZ: Sir, it was put into evidence by the plaintiffs.

THE COURT: What difference does that make?

Q Doctor, did you ever make an inquiry as to whether this man had a family history of cardiovascular disease?

A No, I did not.

Q Did you think that was important in the overall treatment of this patient?

A Yes, but predominantly he came to me because of an injury to his neck and his back.

Q Sir, you treated him for over a year.

A I checked his pressure, I listened to his heart. I made some suggestions to him. I told him to cut down on the salt intake. I advised him to lose weight. It's on the card.

Q Doctor, did you have a copy of this in your record--

THE COURT: A copy of what?

Q Of this report, the conslutation record, which is contained in Exhibit 5, which the doctor has just looked at.

A I never saw that specific one that you just showed me.

Q You didn't have it?

A No. I didn't see that.

Q Did you make any inquiries of these doctors while you were treating this man?

THE COURT: What doctors?

Q The doctor who prepared this consultation.

THE COURT: Who is the doctor?

MR. SCHULTZ: A Dr. Sporn.

MR. LASSOFF: In Richmond, Virginia.

THE COURT: How can he inquire of him, Mr. Schultz? He says he never saw the record, so how could he inquire of Dr. Sporn.

MR. SCHULTZ: I'll go into this.

Q Doctor, you were treating this man, were you not?

A Yes, I was.

Q And you were treating him in January of 1973?

A Yes.

Q And you knew that he had gone to another hospital?

A Yes.

Q And you know that he had certain tests performed?

A Yes.

Q Did you think it important to obtain copies of that hospital record to aid you in the treatment of this man?

A Yes, I did, and I--yes, sir. I have those records. You have my records there. As a matter of fact, I sent a

summary of that report to a company who requested to know about his overall general condition by whom he was treated, whe he was treated, why he was treated and what's going on with him.

Q Dr. Spitz, you are telling us that you never saw this medical consultation record before?

A That specific one I don't believe I have ever seen.

Q Sir, your field is that of medicine, isn't that correct?

A Yes.

Q Sir, isn't this a medical consultation as opposed to an orthopedic consultation?

A Yes, you're right, but I had enough information on the others to know what I'm doing.

MR. SCHULTZ: Move to strike.

THE COURT: Wait a second. He says he never saw it. You haven't proven he knew it was in existence.

MR. SCHULTZ: I want to show he should have asked.

THE COURT: Ask him. There's nothing in the record to justify that inference as of now.

MR. SCHULTZ: I asked him didn't he think it was important.

THE COURT: How did he know?

MR. SCHULTZ: Sir--

Q Dr. Spitz, you knew he was being treated, didn't you?

A Yes, I did.

Q In the hospital?

A Yes.

Q And you knew--

THE COURT: What hospital?

Q Richmond Memorial in Virginia?

A Yes.

Q Sir, you knew that before they did a myelogram they would have a medical work up, didn't you?

A I didn't know, but I assume it would be done. The proper way is yes, it should be done.

Q All right. Did you make an inquiry in the course of your treatment of this patient to obtain a copy of that medical work up?

A I have. I have--

Q Sir, did you make--

MR. LASSOFF: He's saying he has it.

THE COURT: He says yes.

THE WITNESS: Your Honor, it's possible--

THE COURT: Now show him what he is referring to now, what you have in your hand, it's his record.

THE WITNESS: It's possible I may have it in my

records there, I don't know.

THE COURT: The record you have in your hand isn't what this doctor gave you at your request. The record you have is something else. He's referring to records he gave you. And he wants to look at them to see what is in there.

A I have a record from--dated 1/31/73, from Richmond Memorial Hospital by a Dr. Rennie. Now, it appears that this report from Dr. Rennie to me was also sent to this Dr. Sporn whom you speak about. It says so, cc Sporn.

Now, I never got one from Sporn. I should have gotten one, but I never got one.

Q All right. I will pursue this further.

Sir, in a hospital when a person--

THE COURT: Wait a second. When did you get that report?

THE WITNESS: 1/31/73 it was sent out.

THE COURT: So you have a copy of a report from the doctor at Richmond Hospital.

THE WITNESS: Richmond Memorial, that's right.

THE COURT: Of what it found?

THE WITNESS: That's correct.

Q Now, sir, Exhibit 5, your Honor, is a hospital record of Richmond Memorial Hospital. Now, sir, in this hospital record, Exhibit 5, there is a medical consultation

record, is there not?

A This is the medical consultation record, correct.

Q Sir, in a hospital there are different services, are there not?

A There are.

Q There's an orthopedic service, there's a medical service?

A There are.

Q And the medical service, it's charged with conducting a medical examination of a patient, isn't that true?

A Correct.

MR. LASSOFF: Objection to the words "it's charged" your Honor.

THE COURT: Overruled.

Q Its responsibility is a medical examination.

Sir, did you ever receive a report of a medical consultation from Richmond Memorial Hospital in Virginia?

A No, I didn't.

Q All right.

A But I received an orthopedic--

Q Your field is medicine, is it not?

A Okay.

Q Is it not?

A My field is medicine and surgery, yes.

THE COURT: The man can only have what they sent to him; isn't that true?

MR. SCHULTZ: My point, sir, is that as a medical doctor he should have asked for it.

THE COURT: I gather he asked for it and this is what they sent him.

MR. SCHULTZ: I'm going to ask him.

Q Did you ever request the medical consultation report in that hospital?

A I can only explain it this way--

Q Sir, you can answer it.

THE COURT: Let him explain it.

A Yes. Let me explain one thing. I also informed Mr. Chiarello that any reports that he gets I would like to know about his condition. And he should get me copies of them. Apparently he never got me that specific copy. Otherwise, I've got all other copies. There is no benefit either way, either for you or the opposition to--for me not to have a record. Why shouldn't I have a record?

Q Now, sir, isn't it a fact, sir, you didn't have the benefit of this medical work-up while you were treating him?

A That specific one, no.

Q Now, sir, is the symbol for blood pressure systolic, is that correct, and what else?

A Diastolic.

THE COURT: What do they mean?

THE WITNESS: I'll tell him if they ask me.

Q Do you remember what his systolic blood pressure was?

THE COURT: Let's find out what the terms mean. I'm not sure and I'm not sure whether all the members of the jury know what they mean. If they don't know what it means, they don't know what you're talking about.

A I will explain it if you want me to.

Q I just want to know what blood pressure readings he got then I'll go into it.

A I have 150 over--I don't know the diastolic, but it's written down.

Thank you.

150 over 84.

THE COURT: What does 150 over 84 mean?

THE WITNESS: I will explain it, if you want me to.

THE COURT: Go ahead.

THE WITNESS: Blood pressure, systolic blood pressure, is that amount of pressure that the heart muscle exerts to push the blood through the circulation, through the arteries.

THE COURT: Is that the top number or the bottom number?

THE WITNESS: That's the top number. And as you're taking blood pressure reading, as the sound, when you listen to the bend of the elbow with your stethoscope, as the sound disappears, when that sound disappears, that's the final thrust that the blood pressure can give or the arteries can give. That's called diastolic.

THE COURT: And which number is that?

THE WITNESS: That should be under 90. This one over here in this instance was 84.

THE COURT: So you say the first number you give is the systolic?

THE WITNESS: That's right.

THE COURT: And the second number you give is?

THE WITNESS: Diastolic.

THE COURT: Fine.

Q Now, sir, during this--

THE COURT: Wait, you're not finished with that. I'm not going to let you stop there. I want to know what it meant to you, doctor.

THE COURT: It meant to me that everyone's normal blood pressure, tops, most everybody, unless you're in the 70's somewheres, tops, 138, 140 is tops. Above 140 you're now in the range of high blood pressure or hypertension, which means the same thing.

THE COURT: That's the top number, systolic?

THE WITNESS: The top systolic pressure should be under 140.

THE COURT: What about the bottom?

THE WITNESS: The lower number should be under 90.

THE COURT: Under 90?

THE WITNESS: That's right.

THE COURT: Okay.

THE WITNESS: Those are the two upper limits of normal.

THE COURT: Therefore you took this man's blood pressure.

THE WITNESS: And he had 150 over 84.

THE COURT: Which meant to you what?

THE WITNESS: Which meant that he has high blood pressure, not unusually severe. It's there.

THE COURT: All right. Now, you may go ahead.

Q Now, sir, how many times did you record his blood pressure throughout this whole period?

A Once. It's also possible, strongly possible, that I would take it and not record it because every once in a while a patient says to me, doctor, take my pressure. That happens very often.

Q Sir, isn't it good medical practice to keep the

records adequately?

A Yes.

Q Should you not have kept these records--

A I kept it as accurately as I could.

Q Sir, admittedly there is only one entry of all the exhibits.

A For blood pressure in his instance, yes. Can I say something else?

THE COURT: No.

Q Did you ever send this man to an orthopedist?

A Yes, I did.

Q Who did you send him to?

A Dr. Lanier.

Q The field of orthpedics is not within your specialty, isn't that true?

A That's correct.

Q Therefore, you sent him to a specialist?

A That's correct.

Q That specialist is to deal with muscle spasm, strain, isn't that true? That's their specialty?

MR. LASSOFF: Objection, your Honor, to the form of the question.

THE COURT: Ask the witness what it means.

Q The practice of orthopedics, is that a specialty

that deals with sprains, muscle spasms, tears?

A Fractures.

Q Fractures.

A Bones and joints.

Q That's their specialty?

A That's correct.

Q And that's not yours?

A That's correct.

Q Did you write any reports to any lawyers?

A No, I did not. There was none requested from me so I didn't send any.

Q Did there come a time, circumstance when you became aware that there was a law suit pending in this case?

A Yes.

Q When were you aware that there was a law suit pending?

A Truthfully, I don't know. I wish I knew. I would tell you. I don't know.

Q Did you know there was a law suit pending in May of 1973?

A No. I did not.

Q Did you know there was one in July of '73?

A I didn't know. I don't recall at any time knowing whether there was going to be a law suit specifically.

Q When did you first become acquainted with Mr. Lassoff?

A I spoke to Mr. Lassoff when my nurse told me there was a Mr. Lassoff on the phone, there was going to be a trial in this man's behalf. Otherwise I never saw him in my life.

Q Sir, did you prescribe anything for this man's blood pressure?

A No, I suggested that he lose weight and cut down on smoking and salt.

Q Did you prescribe any medication?

A No, he was on medication.

Q What was he on?

A He was on one of the thiazines. I believe Salutensin

Q Sir, were you able to determine whether or not this gentleman's obesity was of long standing? Did you make that determination?

A It may have been only because when I first saw him he was a heavy man, you see. So it may have been, you see, I don't know.

Q Doctor, are these the only records that you have?

A That's the only one I have, yes.

MR. LASSOFF: You mean besides the other papers that he has up in front of him?

A And the ones I gave you over there.

Q Those are not your records, are they, sir?

A They're in my possession, they belong to me.

Q Did you create them? These are sombody else's reports.

A Someone else's, correct.

Q The record that you maintained and created, this is the only one?

A That's correct.

Thank you.

Q There is no other record that you created and maintained other than this one?

A I don't have any others.

MR. SCHULTZ: May I have just a few moments, your Honor, please?

THE COURT: Yes.

MR. SCHULTZ: I offer this in evidence, your Honor.

MR. LASSOFF: I have no objection.

xxxx (Defendant's Exhibit A is received in evidence.)

Q Doctor, what is marked exogenous obesity?

A Marked exogenous obesity means he is overweight and it's due--ex means from without. That means he's overweight from eating too much. Endogenous means there's something wrong inside and he's getting fat that way.

Q Sir, would you say that 160 systolic would be high?

A In anybody.

Q Sir, would a 90 to 100 diastolic be high?

A In anyone.

Q Doctor, if a patient presented himself to you weighing 250 or 265 pounds, and at times his systolic rate was 160, diastolic the rate would be over 100, would you say that that person was a severe case of hypertension?

A Yes.

Q Sir, would you say that that person at that weight was ent rely obese with that particular vascular problem, too?

MR. LASSOFF: If your Honor please, unless we have some description as to the size of the man, he could be eight foot six and be skinny.

A You didn't explain how tall the man is going to be.

Q We'll take Mr. Chiarello. You knew he weighed between 250 and 265 pounds; is that correct?

A He's obese.

Q Sir, if his blood pressure was 160 over 100, would you consider that to be high?

A Yes.

Q Sir, would you consider that to be dangerous?

A In the long run, yes.

Q Sir , that combination of obesity plus that blood pressure or hypertension, that certainly would indicate to

you that he doesn't have a full long life expectancy; isn't that true?

A I don't want to scare the man.

MR. LASSOFF: Objection to the form of the question.

A Taken in any individual--

THE COURT: Wait.

MR. SCHULTZ: I withdraw the question.

THE COURT: Put your next question.

Q Sir, with that condition, would you say that his life expectancy would be diminished because of those conditions?

A Yes.

Q Doctor, are you being compensated for coming here today?

THE COURT: Of course he is, the same as you're being compensated to represent your client. That question is the stupidest question I ever heard in a courtroom.

Next question.

MR. SCHULTZ: No further questions.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Doctor, obesity is a medical term, is it not? besides being a common term, it also has a medical meaning.

A Yes.

Q Medically would I be correct in stating that you

are obese?

A Yes, I'm obese.

Q Okay.

Doctor, before a man undergoes surgery, such as a laminectomy or a myelogram or a Lushka Rhizotomy, do they check out his blood pressure, systolic--

THE COURT: What are you talking about? That's a foreign language to me.

MR. LASSOFF: It's in the hospital record, your Honor.

THE COURT: We don't know it. The jury doesn't know it. They don't know what you're talking about.

Q Doctor, while you were treating Mr. Chiarello, you were aware that a laminectomy had been performed on his spine?

A That's correct.

Q Would you tell the jury what a laminectomy is?

MR. SCHULTZ: If your Honor please, may we have a side bar?

THE COURT: No. You object, the objection is overruled.

MR. SCHULTZ: If your Honor please, may I state the reason for my objection on the record?

THE COURT: You may.

MR. SCHULTZ: Sir, the laminectomy was not performed until December of '73 and he stopped treating him in July of '73. How could he have known there was a laminectomy?

THE COURT: I don't know. We'll find out.

Q Doctor, when did you become aware that the operation on the spine had been performed?

A After it was done.

Q Doctor, would you tell the jury what a laminectomy is?

A Yes.

Q No long descriptions.

A All right. Think of the spine, the spinal column, which is the bony column, as--shaped like this. Like a V, like this, see. And the lamina of the size of this building sort of. They remove the lamina so they can get to the disc or the disc which is a shock absorber, and which in his case was torn, and they take that out and they put in a graft in its position, a bone graft, to stabilize that portion of the spine where they removed the lamina, or the side shelves of the back portion of the spine.

Q That would be called a spinal fusion, would it not?

A They wind up with a spinal fusion.

Q Doctor, what's a myelogram?

A An injection of a dye. It's an opaque dye. You

inject it into the spinal canal for the area you're specifically interested in. It could be in a cervical spinal region, thoracic region or the lumbar spinal region, and then they x-ray to see if that dye flows up and down along the spinal cord, the fluid that bathes the spinal cord, if it is interrupted in any way whatsoever by external pressure or internal pressure.

Q Doctor, the third question. What's a facet Rhizotomy or Lushka Rhizotomy, if you know?

A Facets are external portions of the spine, and they can pinch on the individual's nerves that come off the spine. And you remove it so that you will remove the pressure on the nerve that comes off the spine, whichever region it's in.

Q Are all three of these procedures that I have asked you about considered major or serious surgery?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A I wouldn't call it serious but I would call it major.

Q Major?

A Yes.

Q Doctor, before any of the three things I have said, the myelogram, the laminectomy or the Lushka or facet Rhizotomy were performed, would it be necessary for the medical

consultants to approve the patient for surgery?

A Yes, it would.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, it would.

Q And if this patient's hypertension or blood pressure was elevated to a point that the medical consultant did not consider safe, would he permit surgery?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A He would not have allowed the surgery until the patient is stable.

Q If these procedures had taken place, it was determined by the medical consultant that it was safe for Mr. Chiarello to tolerate these procedures?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A That's correct.

MR. LASSOFF: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. LASSOFF: Mr. Chiarello, your Honor.

* * *

dhh 56 Chiarello-direct

T H O M A S J. C H I A R E L L O, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. LASSOFF:

MR. LASSOFF: At this point, your Honor, I would like to introduce into evidence the hospital record of the Memorial Hospital, Hollywood, Florida.

MR. SCHULTZ: May I have a moment to look at this, your Honor?

THE COURT: Yes.

MR. SCHULTZ: Are you offering both admissions?

MR. LASSOFF: The one I subpoenaed--

(Counsel confer.)

MR. SCHULTZ: If your Honor please, there's a problem. The pre-trial order, your Honor, specifically includes Memorial Hospital in the pre-trial.

MR. LASSOFF: If your Honor please, I think the pre-trial order, as I understand it, was made in May of 1975. There is a hospital record here of July of '75.

THE COURT: I won't let it in.

MR. LASSOFF: It is the same hospital.

THE COURT: Sorry. That isn't what the pre-trial order covered.

MR. LASSOFF: All I want is the first one anyway, your Honor.

THE COURT: He wants the first one in.

MR. SCHULTZ: That's why I asked which one he was offering.

MR. LASSOFF: May I approach the bench?

THE COURT: No.

MR. LASSOFF: I think it is important.

THE COURT: He's looking at a record that you offered in evidence. Now you stand there and keep quiet until he's finish. Because he can't look at that and come to the side bar at the same time.

MR. LASSOFF: All right.

MR. SCHULTZ: I have no objection to the admission of of October 3, '74, your Honor.

MR. LASSOFF: May we approach the side bar on the other issue, your Honor?

THE COURT: You may.

(At the side bar.)

MR. LASSOFF: Your Honor, the defendant had a physical examination of the plaintiff yesterday, at which time they were supplied with the hospital record, with the myelogram, with everything that is in that second admission.

THE COURT: It is not coming in. Sorry, your pre-trial order only goes to May 5th.

MR. SCHULTZ: If your Honor please, may I be heard on this?

THE COURT: I have ruled on that.

MR. SCHULTZ: It is just in relation to the statement. It was agreed that we could have a physical examination when this man came to New York because he had been in Florida.

MR. LASSOFF: No question about that. I'm not contesting. I gave it to you voluntarily.

THE COURT: I don't understand your point. Your pre-trial order only lets in things up to the pre-trial order.

MR. LASSOFF: There can't be a claim of surprise.

THE COURT: It isn't that. You didn't put in the pre-trial order.

MR. LASSOFF: All right, your Honor.

(In open court.)

(Plaintiffs' Exhibit 7 received in evidence.)

Q Mr. Chiarello, I believe we were some place past when you discontinued the machine on your back.

A Yes, sir.

Q What happened after you stopped using that machine?

A The pain was beyond the capacity of the machine itself. The machine itself was only made to take a certain

amount--

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained. You know, you keep volunteering all this technical information and you are not competent to testify.

Q What I am concerned about, Mr. Chiarello, is not your opinions or your expertise, physical facts. Were you referred to a psychiatrist?

A Yes, I was.

Q By whom?

A Dr. Stephen Gervin.

Q Who was the psychiatrist?

A May I look for his card, please?

THE COURT: Yes.

Q Sure.

A Dr. Arnold Zager..

Q Were you under this psychiatrist's care for some period of time?

A Yes. Would you like his address?

THE COURT: How do you spell his last name?

THE WITNESS: Z-a-g-e-r.

THE COURT: All right. He said yes. Next question.

Q How long were you under his care?

A Between two and three months. I believe it was

about two months, approximately two months.

Q Why did you stop seeing him?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Were you finished with the psychiatrist at the time you stopped seeing him?

A No.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained. You went there for two months. How many times? How many visits?

THE WITNESS: Twice a week.

THE COURT: That's eight visits?

THE WITNESS: Yes, sir. No. That's two months, that's 16 visits. Two months. Twice a week, sir.

THE COURT: Twice a week?

THE WITNESS: Yes, sir.

THE COURT: All right. Go ahead.

Q After you terminated with the psychiatrist, did you come under Dr. Gervin's care again?

A Yes, sir, I did.

Q Did he put you in the hospital again?

A Yes, sir, he did.

Q When was that?

A October, '74. Is that it? No, let me see.

Q I can't hear you, will you speak up?

A I believe --

MR. LASSOFF: I think the record shows October 24th, your Honor.

A The year I'm --

Q '74?

A '74.

Q What hospital was that?

A Richmond -- no, Hollywood Memorial in Hollywood, Florida.

Q What, if anything was done to you in that hospital?

A They did the rhizotomy at that time.

Q During the performance of that rhizotomy were you conscious?

A Yes, sir, you have to be.

Q Would you describe this particular surgical procedure to the jury?

A Well, they mildly sedated you because you have to be awake and conscious of what is going on. They lay you on an X-ray table face down. Then they, in the area where the pain is, in the lower back down here where the pain is, they have a machine standing next to you, it's an electronic machine with two wires coming from it and

there are two long needles attached to the ends of the wires.

He inserts those needles into your spine. At this time he is looking at a fluoroscope to make sure that he is getting where he wants to be inside next to the spine. He inserts one and then he inserts the other. Then he tells you I am going to build up the pressure. As I build up the pressure, when you are ready to scream, scream, and I will burn the nerve. That will tell me that I am on the nerve that I want to be on. So he would build up the pressure, he would tell you to hold it, hold it, hold it and then when you screamed, he burned the nerve and he took them out.

Q How many times did he do that procedure?

A Eight times.

Q After this surgical procedure, how did you feel?

A The pain was -- had subsided quite a bit in my right leg. It had not subsided at all in my back. But I had-- I was very dizzy and disoriented because of the extreme pain that the rhizotomy causes prior to the burning of the nerves. It is bad. And that's -- I was very disoriented after getting out of the hospital.

Q When you got out of the hospital, after the rhizotomy, when you first got out, was the pain in your

right leg gone?

A It had diminished quite substantially.

Q Can you tell me how long that diminishment of pain continued?

A For about a month.

Q Then what happened?

A It came back again.

Q What did you do then?

A Went back and told Dr. Leone and Dr. Gervin that it was back again, that the pain had come back. And they, Dr. Leone continued his physiotherapy. But at that time their opinion to me --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

A Okay. I can't say nothing.

Q All right. Did there come a time -- incidentally, until you came up here to New York for this trial, were you still under Dr. Leone and Dr. Gervin's care?

A Yes, sir.

Q Can you tell me, was another myelogram taken of you after the one we talked about when the operation was performed?

A Yes, sir.

Q When was that?

A July, '75.

Q Did you bring those X-rays up here to New York with you?

A Yes, sir, I did, I brought them all. I also -- I'm sorry, I can't--

Q During the months after the rhizotomy, until you went back for the myelogram, the last myelogram, can you tell us how you felt with particular relationship to your back and leg?

MR. SCHULTZ: I respectfully object, your Honor.

THE COURT: On what basis?

MR. SCHULTZ: Well, if your Honor please, we are now talking about 1975.

THE COURT: He is claiming the pain has been continuous since 1972.

MR. SCHULTZ: I understand, your Honor.

THE COURT: All right.

MR. SCHULTZ: However, there's been a medical at this point that it could have been caused by obesity, that it could have been aggravated by it, and I'm objecting --

THE COURT: The testimony was if it existed it could have been. The objection is overruled.

Q Do you remember the question?

A No, sir, I don't.

MR. LASSOFF: Could we have the question read, please?

(Question read)

A With particular relationship just to the back and the leg, it became increasingly difficult to walk; to do the normal things that you -- that I guess I was used to doing a long time ago. But the pain increased back to the point that it was prior to the operation. Severe cramps and pains in my right leg, severe, very severe pain in the lower spine, which radiated out into both buttocks.

Q Mr . Chiarello, with relation to the feeling in your leg after the rhizotomy, would you tell us, the pain that you have in the leg, was it the same before the rhizotomy or is it different in character?

A No, it is the same, sir.

Q Does it run on both sides of the leg or one?

A Down the right side of the leg and then it spreads out into the foot, sir.

Q What I am asking you, you have the pain running down the right side of the leg. What's with the left side of the leg?

A Nothing.

Q You say nothing. What does that mean?

THE COURT: Nothing.

A There is no pain in that side, sir.

Q Do you have feeling in that side of the leg?

A Yes, sir, I do.

Q Since that last myelogram, have you had any further surgery? I refer to July 28th of '75.

A No, sir.

Q Since that last myelogram, would you tell us how the pain in your back and your leg has progressed, if it has?

A After the myelogram I had severe reaction in my back after the myelogram. I ended up in bed after the myelogram for over two weeks. I had severe pain in the left leg running halfway down the left leg, and the pain was back a lot more than it was prior to the myelogram. Reason, I can't give you, but it was.

Q Mr. Chiarello, as you sit or stand here today, would you tell me what, if anything, bothers you with regard to the injuries you sustained of this accident?

MR. SCHULTZ: Objection as to form, your Honor.

THE COURT: Overruled.

A I can't--

Q That means everything.

A Everything that bothers me?

Q Everything.

A I have numbness and loss of strength in the right hand, pain in the right arm, right shoulder. Pain back of neck and underneath this bone on the right-hand side of the back of the neck.

I get extremely severe headaches, very, very severe. They last anywhere from 14 to 20 hours when they come on. There is very little medication that seems to have that much effect except very strong medication.

Q What medication are you on now?

A I take Percodan for the back, I take a combination of Fiorinal and Vistaril for the headaches, I take-- what the heck is the name of that stuff? --

Q Relax, Mr. Chiarello.

A I can't remember the name of the other one. Something to calm you down. I can't remember the name.

Q Valium?

A Valium. Thank you, sir.

Q Go ahead. Continue. I was asking you --

A I was just going to say those pills, most of those pills, such as Percodan and Vistaril, affect you, your mind and your --

Q Not my mind.

MR. SCHULTZ: Objection.

Q How does it affect you?

A It makes me extremely light headed, judgment is not very good. I can't drive when I take it. I have not taken any today. Go ahead.

Q Well, I think we have got the head and the arm and the neck. Is there anything else?

A Yes, sir. The same pain is down in the lower back where the operation was at the base, at the lower part of the spine.

Q Would you describe the pain in the lower back to us?

A It is very difficult. I guess it is like somebody taking a very, very hot knife and putting it in and twisting it. And that sends the shock down the leg.

Q Is this pain that you are telling us about, is that a constant pain or does it come and go?

A It is constant, it is there. Unless you take enough pills.

MR. LASSOFF: Your Honor, before I turn to another subject, can I ask for a recess for Mr. Chiarello? I think he is getting a little--

THE COURT: Yes. We will have a short recess.

(Recess)

(Jury present.)

BY MR. LASSOFF:

Q Mr. Chiarello, you said that you were employed as a terminal superintendent by Universal Terminal and Stevedoring Company?

A Yes, sir.

Q Would you tell us what your duties were as a terminal superintendent?

A My own personal duties was to take care of the truck line, that is the loading and unloading of trucks, the setting up of trucks, the distribution of the cargo on the pier in its proper areas, the loading and unloading of containerized cargo, the loading and unloading of railroad cars. That meant knocking open the doors, sliding them open, making sure everything was ready for any type of work that there would be. Making sure all the containers were lined up and ready for work and making sure that they were working themselves.

I had quite a few men under me. There's quite a bit of physical work involved in it, in that most piers run between a thousand, 1,500 feet in length. And you walk that pier anywhere from 25 to 40 times a day. Up and back. You are climbing on top of cargo looking for someone's cargo that is in need of getting it. If there is discrepancies

in trucks, you must climb up into the truck and squeeze in on top and work your way forward so that you can count the tiers back. If something falls on the ground and there's nobody around, you pick it up. If there is machines to move out of the way, you move them. If there's heavy lifts to come off of trucks or to be put on trucks and there is no one available, you get on a 26-ton machine, you pick it up, jump off, set the chocks underneath it. Those are large wooden blocks, so that the blades from the large machine can be taken out.

What else is there? There is a small amount of clerical work in my particular type of superintendent's job. It is not that much. The head superintendent of the pier has a lot more clerical work to do.

There are times when you've got to go down the lower hold of a ship and find cargo for somebody that wants it and that is 60, 80-foot down a steel ladder. Climb over cargo, find the stuff, make sure that the men take it out. Get back up, climb out and back onto the dock again.

I had more dock work with trucks and rail cars and containers, and the latter part of my work with Universal was mostly in containers. That's approximately what I did.

Q If you were going to divide your work into manual labor and administrative work, can you give us a percentage

of what part of your time would consist of manual labor and what part administrative work?

A Administrative--

MR. SCHULTZ: If your Honor please, I am going to object as to that characterization. Objection as to form, your Honor.

THE COURT: I will let him describe what he does. The objection is sustained.

Q Clerical work. About what percentage of your time would be done in your clerical duties as a superintendent?

A Maybe five or ten percent of the time. Not very much, really.

Q And the rest of the time?

A Walking, picking, climbing.

Q Manual work?

A Hollering.

Q Manual work?

MR. SCHULTZ: Objection, your Honor.

A Yes.

THE COURT: What is the objection to the word manual?

MR. SCHULTZ: Yes, sir.

THE COURT: Overruled.

Q Mr. Chiarello, I show you these income tax papers

for the years 1969 through 1972 and I ask you if these are your income tax returns and W-2 forms.

A Yes, sir, they are.

MR. LASSOFF: I offer them in evidence, your Honor. I have already shown them to Mr. Schultz.

MR. SCHULTZ: May I have them, please?

If your Honor please, I have no objection to the 1969, no objection to the 1970. I do object to the 1971, your Honor. And I have no objection to the 1972. The reason for the objection to the '71 is, number 1, it appears to be unsigned, there is no W-2 form attached to it.

THE COURT: Let me see it.

MR. LASSOFF: Let me see it.

It is true the W-2 form has disappeared from that one.

THE COURT: Let me see it.

Objection overruled.

(Plaintiffs' Exhibit 8 received in evidence.)

Q Mr. Chiarello, did you ever work for anybody after June 30th of 1972?

A No, sir, I have not.

Q Did you remain on Universal's payroll for some time after June 30, 1972?

A Yes, sir. It was the policy of the company.

Q How long did you continue on Universal's payroll after June 30th?

A To January 1, 1973.

Q Of '73?

A Yes, sir.

Q In addition to your income from working for Universal, were there also fringe benefits connected with your employment for Universal?

A Yes, sir.

Q Would you tell us about those fringe benefits?

A We had a Saturday and Sunday deal that if you worked a Saturday or Sunday you got $50 for that day. If you worked both days, you got a hundred dollars. Because we worked on a base salary and other companies were getting this fringe benefit and Universal decided that since everybody else was getting it it would be fair for us to have it, too.

THE COURT: But that's reflected in the income, isn't it?

MR. LASSOFF: Yes.

Q But you didn't get that Saturday or Sunday work after you got hurt, did you?

A No, after June 30th I was paid a straight salary.

Q Do you got the straight base salary after that?

A Yes, sir.

Q Referring to other kinds of fringe benefits than just salary?

A We had a heck of a good insurance policy.

Q What kind of an insurance policy?

A It covered anything.

MR. SCHULTZ: Objection, your Honor.

A Any--

THE COURT: Sustained. Do you have the policy here?

Q Have you got the policy here, Mr. Chiarello?

A No, sir, I don't. No.

Q When you were terminated by Universal, after six months after the accident, did all of your fringe benefits cease?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Can I answer it?

THE COURT: Yes.

A No, they didn't.

Q How long did they continue?

A Our insurance policy continued until -- for one year after January 1st. That would be January 1st of '74. It was terminated.

Q Now --

A I also got one other thing. Okay, I'm sorry.

Q Since you don't have the policy --

A Okay.

Q Mr. Chiarello, at the time this accident occurred, did you own your own home?

A Yes, sir, I did.

Q Where was that home located?

A 148 Figurea Avenue, Staten Island.

Q Would you describe the house and the area that it covered?

A Yes. It was a one family detached home, it was on, I think it was, 40 by a hundred plot, the back yard, fenced in back yard, swimming pool. It was more like a mother and daughter home because it was up and down, too. I had both up and down stairs to myself. We had a family room downstairs and an additional kitchen and a full three rooms upstairs with a kitchen, living room and dining room.

Q What, if anything, did you do to take care of that home prior to this accident?

A You cut the --

Q You, not me. I didn't do anything.

A I cut the lawn, take care of the swimming pool,

take care of painting, odds and ends that break down, take care of shoveling the snow when it snowed, chipping away the ice, anything else that there was in the house a guy does. Take out the garbage.

Q Who did that work after you got hurt?

A Most of it was done by my wife and myself.

Q I believe you testified that when you got hurt you had one daughter five and a son nine and a ten-year old daughter?

A Yes.

Q Prior to this accident, what, if any, activities did you participate in with your children?

A Prior to the accident?

Q Yes.

A Coached and umpired my son's baseball games; took the kids sleigh riding. You know, things a father does.

Q Try a little. I know it is hard, Mr. Chiarello. But think about it and tell us.

MR. SCHULTZ: If your Honor please, may I respectfully object to that, please.

THE COURT: Sustained.

MR. SCHULTZ: I move it be stricken.

THE COURT: Strike it. Comment is unnecessary, Mr. Lassoff.

MR. LASSOFF: All right, your Honor, I'm sorry.

THE WITNESS: I'm sorry.

You go to the movies with the kids, take them fishing, sleigh riding, play ball with them, general horsing around. Grow up with them.

Q Mr. Chiarello, was your son in the Little League before this accident?

A Yes, sir, he was.

Q In order to be in the Little League in Staten Island, were you as a parent compelled to donate a certain amount of hours per season for Little League?

A Yes, sir, you are.

Q Can you tell us about that?

A Yes. At that time then the parent of the child had to donate 15 hours to the field, since the Little League owned the fields. So during the baseball season you kept the grounds clean, you weeded, you cut out the fields. And prior to the baseball seasons you put up the stand and mended the fences and all that kind of stuff.

Q Who did that after you got hurt?

A It was the policy that if --

MR. SCHULTZ: If your Honor please--

Q Just what happened, Mr. Chiarello.

A My wife did it. My wife went and had to work in

the concession stand.

Q When were you married?

A June 10, '61? '61. That's hard to remember.

Q Okay. Where?

A In Brooklyn.

Q Where?

A Holy Ghost Church.

Q What was your relationship with your wife and children before this accident?

A Good. We had good times, lots of fun. We were a good family.

Q Tell us is that still the same or has it changed?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Have you noticed any changes in your personality or behavior since this accident?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Did you act after this accident in the same way that you acted before the accident?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

MR. LASSOFF: It might be an item of damages in the wife's case which is a separate case.

THE COURT: That isn't the question.

Q Has this accident affected your relationship with your children?

A Yes, sir.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

MR. LASSOFF: I think that is an item of damages, your Honor.

THE COURT: No.

Q What, if any, work have you done around your house here or in Florida since this accident?

A Nothing. Nothing. I -- nothing.

Q Who takes care of the house in Florida?

A My wife and my children.

Q Can you tell us what you went to see the psychiatrist about?

A Yes, sir.

MR. SCHULTZ: Objection, if your Honor please. Unless he tells us that the psychiatrist is going to be here to testify, your Honor.

THE COURT: True.

Q When you got out of the hospital after the operation, Mr. Chiarello, what, if anything, occurred with regard to the medicine prescribed for you?

A May I ask which --

MR. SCHULTZ: May I respectfully object, your Honor?

THE COURT: I don't understand that question. Reframe the question.

Q After you got out of the hospital, after the laminectomy, the operation on your spine, did something occur with regard to the medicines prescribed for you by the doctors?

MR. SCHULTZ: Objection, your Honor.

THE COURT: The question isn't clear.

MR. LASSOFF: Without leading, your Honor, it is very hard.

THE COURT: Do you know what your lawyer is talking about?

THE WITNESS: Yes, sir.

THE COURT: You did? You can answer it.

MR. SCHULTZ: May I respectfully object, your Honor. I don't believe this witness is competent to state what the effect of medicine has.

MR. LASSOFF: I didn't ask him.

THE COURT: He didn't ask him that. He had been taking medicines up to the time of the laminectomy. He has the laminectomy. He is now being asked the effect of these

same medicines after the laminectomy. He's the one that took them. He ought to be able to tell us.

Objection overruled.

A They gave me -- I was having a very bad time sleeping after the laminectomy. I was taking Seconal at that time to sleep. I was also on the Percodan. When I asked them, after I got out -- I wish I knew how to phrase this properly -- they gave me prescriptions for Seconal, Percodan, Valium and Elavil but they would not give them to me. They gave them to my wife. She was told not -- that I was only to have --

MR. SCHULTZ: If your Honor please--

THE COURT: Sustained.

MR. SCHULTZ: Move to strike and objection, please.

THE COURT: Sustained.

Q Incidentally, before this accident, did your wife ever work?

A No.

Q Did she work after this accident?

A Yes.

Q Did an event occur which caused her to stop working?

A Yes.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

Q Tell us about that.

A I'd rather not. Do I have to?

THE COURT: You don't have to if you don't want to.

Q I can't force you to tell me about it. If you don't want to, you don't have to tell me about it.

With regard to your physical relations with your wife, can you tell me the status, that side of your marriage before this accident?

A Very good. Very good. Satisfying. We loved each other very much and it was good relations.

Q Did that change as a result of this accident?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. LASSOFF: I will withdraw the question.

Q Did that change after the accident?

A Yes, it did.

Q In what way?

A We could not have satisfactory relations owing to the fact that I had become what I was told is impotent.

MR. SCHULTZ: I respectfully object, your Honor, move to strike.

THE COURT: Overruled. The doctor testified that he even treated it.

MR. SCHULTZ: If your Honor please, he treated him because of his complaints. There is no finding, your Honor, that he was impotent.

THE COURT: The doctor says he treated it.

MR. SCHULTZ: He gave him vitamins, if your Honor please.

THE COURT: He gave him what he said was the normal treatment for the complaint. He described it to the jury.

Q You can continue, Mr. Chiarello.

A Yes. After the accident there was no way that we could have satisfactory sex act. I could not satisfy here and it made relations very strained, so strained that she even wanted to get a divorce at one time.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

MR. SCHULTZ: Move to strike it.

THE COURT: Strike it.

MR. SCHULTZ: I will ask your Honor to instruct the jury not to regard that at all.

THE COURT: When I strike it from the evidence, you are not to consider that evidence in your deliberations. Go ahead.

A It meant--

THE COURT: I suggest you put another question, Mr. Lassoff. You have made your point. He says he could not have relations with his wife as a result of the accident.

Q Mr. Chiarello, this impotence you are talking about, has that had any effect on your besides the physical impotence on your personality or otherwise?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Can you tell us of any changes in your character that you have noticed since this accident?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q When you referred to the strained relationship between you and your wife, can you tell us who was creating the strain?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Can you tell us with what frequency you and your wife had relations prior to this accident?

A Two, three, four times a week.

Q Since this accident.

A Excuse me, since the accident?

MR. SCHULTZ: Objection.

THE COURT: Objection overruled.

A Since the accident? Or prior to?

THE COURT: Since.

Q You have already answered prior to.

A Now you want to know since. How many times a week? A month, a year, I don't know.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. SCHULTZ: I respectfully object to the leading question.

THE COURT: Overruled.

It is not a leading question. He asked a simple question.

How many times after the accident?

MR. SCHULTZ: Your Honor, then he said a month, a year.

THE COURT: That was in response to what the witness said himself.

The objection is overruled.

A We have not had a satisfactory sex act since the accident. By "satisfactory," if I may, I mean to a completion. You try, the pain says "stop" and you stop. And you go away.

Q How often do you try?

A How often do I try? Whenever it is physically possible for me to try. You try, and you try and you try.

MR. LASSOFF: You may inquire, Mr. Schultz.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q MR. SCHULTZ: Shall I wait a few moments, your Honor?

THE WITNESS: No, please. Go ahead. I'm sorry.

THE COURT: Go ahead.

Q Mr. Chiarello, when did you first go into the stevedoring business?

A I think I was about eight years old. Summertime. I used to come home. My father always worked, my grandfather always worked, he started the company before the first World War and every summer.

Q All right.

Sir, you went to work, I assume, at some point, ona full-time basis in the stevedoring business, is that correct?

A Yes, sir.

When I got out of the service in 1961, I went full time.

Q And you went to work, sir, for American Stevedores, is that correct?

A Yes, sir, that is correct.

Q And, sir, the principals of American Stevedores, as I recall, was a G. B. Chiarello --

A And James Chiarello, and Dick Chiarello and Joseph Chiarello.

Q Sir, what is your relation to G.B. and Joseph and the others?

A G.B. is my uncle, Joseph is my uncle, Dick is my uncle and James is my father.

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Q They were the principals of the American Stevedores, is that correct?

A That is correct.

Q Sir, there came a time -- then there's two Joe Chiarellos, isn't there?

A Yes, sir.

Q One inside and one outside, is that right?

A I don't understand what you mean, sir.

Q Doesn't one of the Josephs -- didn't he work insid and then there's another Joseph -- That's Joseph, isn't it (indicating)?

A That's my father-in-law.

Q That's your father-in-law.

Is there a Joseph Chiarello?

A My uncle Joe, there is.

Q And he works outside, isn't that true?

THE COURT: He doesn't understand what you mean by inside and outside.

A I don't know what you are trying to get at, sir. There is only one Joseph Chiarello in American Stevedores.

Q All right. Some of the work that was done by American Stevedores, one of the individuals or two or three did primarily internal owrk and some were outside on the docks?

A There's only one inside man.

Q Who was that?

A G.B., Gus Blair.

Q Sir, eventually American Stevedores was taken over by Universal?

A Yes.

Q Is that right?

A That is correct.

Q And you continued on in the employ of Universal Stevedores, isn't that correct?

A Yes, sir.

Q Sir, you became a superintendent when?

A 1961. For American Stevedores.

Q That was in a family-owned stevedoring organization, is that correct?

A Yes.

Q Did some of your family continue on as officers of Universal?

A Not as officers.

Q Did they continue on in the employ of Universal?

A Yes, sir, they did.

Q With relation to the happening of this accident, at the scene where the accident took place, sir, was the roadway wet?

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A Yes, sir, it was.

Q And, sir, you told us that there was a dip in the roadway underneath the trestle, was that correct?

A Yes, sir, that is correct.

Q Sir, in any of these pictures that are in evidence --

MR. LASSOFF: There's three. One is not.

Q -- Plaintiff's Exhibits 1, 2 and 3, is there any picture of the trestle and the dip that existed under the trestle?

A Yes, sir.

Q Where is it, sir, which one?

A Right here.

Q All right, sir.

Now, with relation to Plaintiff's Exhibit No. 1--

MR. LASSOFF: He is showing you another one.

Q -- Plaintiff's Exhibit No. 1.

A That's this here.

Q Right.

-- you say that that picture depicts the trestle; is that correct?

A Yes, sir, that's the railroad trestle.

Q There is a dip in the roadway on the other side of the trestle, is that correct?

A It starts on the other side of the trestle and ends on the bridge side of the trestle.

Q All right.

But there is a dip after you cross the trestle?

A You don't cross the trestle. The trestle is over the top of you.

Q I know, but as you go underneath it, there is a dip, is that correct, sir?

A Yes, that is correct, sir.

THE COURT: The way you are doing this with your hand seems to indicate that the dip comes after the trestle.

Is that what you are saying?

THE WITNESS: No, sir, the dip is underneath the trestle.

THE COURT: The bottom of the dip would be underneath the trestle, is that it?

THE WITNESS: Yes, sir, it is.

Q Is it directly under the trestle or further towards the entrance to the bridge?

A No, it is directly under it, sir.

Q Now, sir, was there a puddle under the trestle?

A No, there was not.

Q Did the occurrence take place after the puddle?

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Was there a puddle and then were you involved in this collision after your car had gone through the puddle?

A No. I was involved in the accident prior to the puddle on the ramp. On the entrance ramp.

Q In other words, you had not gone through the puddle, is that correct?

A No, sir, I had not.

Q How many lanes were there at that point, sir?

At which point, sir?

Q At the exact point of impact.

A At the impact there is only one lane there, sir.

Q How wide was that, sir?

A Well, it would have to be a guess, isr. I didn't measure it but it is wider than the bus is. At that point.

Q Had you gone through a puddle at any time just prior to this accident?

A No, sir.

Q Now, sir, there were two cars ahead of you, is that correct?

A Yes, sir, that is correct.

Q One of the cars was proceeding through the puddle?

A Yes, sir.

Q That car was in motion?

A Yes, sir.

Q The car that was immediately in front of you--

A Yes, sir.

Q -- when did you first become aware of that car?

A When I saw his brake lights when I was over by the trestle.

Q Had you followed him onto the ramp?

A No. No, I had not. I came after him. He was already up there towards the puddle. Hew was up at the puddle because his brake lights were on. And I saw them from well back. I was a couple of hundred feet back when I saw him. That is fairly straight up; you can see.

Q Sir, when you first saw this car with its brake lights on, did you see the car ahead of it?

A I can't actually say I did, sir. You spot the brake lights; you are driving, you spot the brake lights. I don't believe I did, sir.

Q How fast were you going when you spotted those brake lights?

A I would say about 15 to 20 miles an hour,in there.

Q Sir, will you describe the operation of your car,

what you did at that point?

A At the point when I saw the brake lights?

Q Yes.

A The first thing you do when you see brake lights, your foot comes up off the accelerator, which mine did, and I slowly came up to the-- to that car that had stopped, finally stopped. And I pulled up behind him and I stopped behind him.

Q How far behind him was the front of your car?

A You could see the ground -- I would say about 10 feet.

Q Sir, when your car was stopped, was it on an area that you can see on Exhibit 1?

A No, sir, it is not.

Q It wouldn't be visible on Exhibit 1?

A No.

Q It would be further underneath the trestle?

A Oh, no, no.

THE COURT: The other way.

Q Backwards.

A It is behind you here. This is going towards Bayonne, looking this way is going towards Bayonne, towards the trestle.

Q So, in other words, it would be behind you?

A Yes, sir, it would.

Q Now, with relation to the exhibits, is there any place on here that is depicted which would indicate where your car was when you say it was stopped?

A Right before this.

MR. LASSOFF: I believe there is a circle marked in that picture.

A That truck is going through the water so I was right around in there. It is deceiving on a small camera, sir.

Q All right, sir. Just a moment.

With relation to this Plaintiff's Exhibit 3, you say that the point where your car would be, would be somewheres in back of the truck that is there?

A Yes, sir, that is correct.

Q Sir, in back of that, was this trestle?

A Yes, sir; well,in back of that.

Q Is that correct?

A Yes, sir.

Q In other words, the trestle would be further towards the Jersey side than is depicted on this exhibit?

A Yes, sir, it would be back here like this.

Q All right.

Is it possible, sir, to see from the trestle,

the point where this accident took place?

A Oh, sure. Yes. You can see all the way up to where the other lanes come in.

Q All right, sir.

How big was this puddle?

A Well, sir, it was big enough for all four tires of the car-- well, I could only see two of the tires at the time, but it was big enough that the front and rear tires of the car going through the puddle were both splashing up the water at the same time.

Q Had the car in front of you started to move, the one immediately in front of you? Had it started to go through the puddle before the impact?

A Not at the last time I looked at it, sir.

Q Do you know, sir, whether it was in motion or not at the time of the impact between your car and the bus?

A I couldn't say definitely, sir.

Q You don't know?

A I couldn't say definitely sir.

Q Had you started to move at all before the impact?

A No, sir, I did not.

Q Now, sir, you told us that there came a time

when you went to Florida?

A Yes, sir.

Q You told us, I believe, that you went to Florida in August of 1973, is that correct?

A Yes, August of 1973. Yes.

Q Sir, before that, had you been in Florida?

A Yes, sir.

Q On a temporary basis?

A Not on a temporary basis. My father lives there.

Q Your father lives in Florida?

A Yes, sir.

Q Could you tell us where your father lives in Florida?

A Yes, 511 South Highland Drive, Hollywood.

Q Sir, your father is James Chiarello, is that right, sir?

Q And he was an officer of American Stevedores?

A Yes, sir, he was.

Q Sir, you stayed at your father'splace from when to when?

A You mean after I left New York for good, perma - nently?

Q Even before you went, did you go to Florida beforehand?

A I visited him once or twice,yes.

Q Subsequent to this accident?

A Prior to the accident.

THE COURT: No. Between the time of the accident and the time that you permanently left Staten Island, did you ever visit your father in Florida?

A Once.

Q Could you tell us when that was, sir?

A I cannot. I am very sorry. I can't. I'd have to call him and find out; maybe tomorrow I could let you know.

Q All right.

Sir, then, in August you went and moved to Florida? Is that correct?

A Yes, sir, August 1.

Q What is your address there in Florida?

A Now my address is 11899 Northwest 24th Street, Coral Springs, 33065.

Q Sir, do you live in a private home there now?

A Yes, I do.

Q Do you and your wife own that home now?

A Yes, sir, we do.

Q Does that home have a pool?

A Yes, sir, it does, sir.

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Q Is that home a one-family home?

A Yes, sir, it is.

Q How far is that home from your father's place?

A A half hour.

Q Getting back to this accident, sir, immedaitely after the accident did you get out of your car?

A Not immediately, no, sir.

Q Within a few minutes after the accident did you get out of your car?

A Yes, sir.

Q Sir, did you walk back to the bus?

A Yes, sir, I did.

Q I assume then you went into the bus and you went up the stairs?

A Yes, sir. The driver had gone back in to exchange -- I went back in to excahnge the licenses with him and the driver that was hit in front of us.

Q Then you left the bus?

A Yes, I did.

Q Sir, I assume, then, you went home , and you eventually went home as you have told us, after the car was pushed and you got out and into your brother-in-law's car, I take it?

A Yes, sir.

Q And you went home?

A Yes, sir.

Q Sir, Dr. Spitz' office is located in Brooklyn, is that correct?

A Yes, sir.

Q And you lived in Staten Island?

A Yes, sir.

Q You told us that you went to Dr. Spitz for the first time on July 3, 1972, sir?

A Yes, sir, that is correct.

Q I assume, sir, did you go to his place at his office?

A Yes, sir, I did.

Q How did you get from your home in Staten Island to his office?

A My wife drove me.

Q Sir --

MR. SCHULTZ: May we have that exhibit, that doctor's record?

MR. LASSOFF: The last I saw it you had it. I have not seen it since.

Q On each of the visits that you went to this doctor, did you go to his place in Brooklyn?

A Yes, sir, I did.

Q How did you get from your home to his place in Brooklyn?

A Either my wife drove me or my father-in-law drove me. One of them was always with me.

Q Now, sir, how did you get from your place to Richmond, Virginia?

A My father drove me.

Q Sir?

A My father drove me.

Q You went in a car?

A Yes, sir, I did.

Q An ordinary passenger car?

A Yes, sir, I did.

Q Now, sir, I assume that-- did there ever come a time after this accident when you drove a car?

A Yes, sir.

Q WHen did you for the first time following this accident drive an automobile?

A I couldn't tell you in any honesty.

Q Approximately.

A I'd say a couple of months after the accident. I'd be lying if I told you that because I don't remember, sir.

Q Your best estimate, sir, would you say it was

within a couple of months after the accident?

A Yes, sir.

Q And you drove a car?

A Yes, sir.

Q Do you have a license to drive in Florida?

A Yes, sir, I do.

Q Do you drive a car now in Florida?

A Yes, sir, I do.

Q How often do you drive a car, say in a week?

A Now that my wife is home and not working, I'd say a couple of times a week.

MR. SCHULTZ: If your Honor please, do you want me to continue?

THE COURT: Yes, I will sit until a quarter of five.

MR. SCHUTLZ: All right, sir. I didn't know.

Q On any of these occasions in 1972 and 1973, did you drive to the doctor's office on your own?

A To Dr. Spitz' you are speaking of, sir?

Q Yes, I am.

A Yes.

Q Could you tell us on how many occasions of these visits that you did drive to Dr. Spitz' place?

A I couldn't tell you.

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MR. LASSOFF: Your Honor, may we have a qualification; the word "alone," does that mean without somebody with him or his driving? I don't object. I just want it clear on the record.

THE COURT: You mean driving?

MR. SCHULTZ: I will rephrase it so that there is no mistake.

Q I want to know, Mr. Chiarello, at any time that you went to this doctor, from July 2 of 1972 until July 30 of 1973, did you physically drive a car to his office?

A Yes, sir, I did.

Q Can you tell us on how many of those visits, your best estimate, that you drove from Staten Island to 84th Street in Brooklyn, that you physically drove the car?

A I couldn't tell you in any honesty because it would be a wild, wild guess.

Q Sir, would you say that, just to test your memory, if you would, sir, would you say that you drove at least 50% of the time, that you peronally drove the car or would it be more or less or what?

A It would be less and it would be quite a bit less. But how much exactly, how much even close to it,

sir, would be hard for me to tell you, but it was much less than 50%, I'm quite of that.

Q Would you say that you drove once a week to his place?

A No, no.

Q Did you drive the car at least once a week?

A Did I drive the car at least once a week? It depends on the period you are talking about. If you are talking about immediately after the accident, within the first few months, no, I did not.

If you are talking about, say, after January something, like that, yes, possibly once a week, sir, yes.

Q In other words, the accident happened in June 1972.

A Yes, sir.

Q Let's take it, say to September of 1972, would you say that at that point you were driving -- you personally -- were driving the car at least once a week in September --

A From September after or from the time of the accident to September? What's what I don't understand.

Q Subsequent to September.

A Subsequent means afterwards?

Q Yes.

OK. Afterwards? Possibly.

Q In September of 1972 you were driving the car at least once a week?

A Approximately, yes, when it became necessary, yes.

Q Would you be good enough to tell us your education, please?

Did you go to a private school in Baltimore?

A Yes, sir.

Q Was that an academy?

A It is a military academy, yes,sir; for ten years .

Q During that period of time did you play football there?

A Yes, sir, I did.

Q And you played football which was the equivalent of high school football, did you not?

A It was high school football.

Q What position did you play?

A Tackle.

Q I assume that in that game you had to absorb some blows in and about your neck and your back, isn't that true?

A Yes, sir, that is true.

Q Now, sir, how many hours a day did you work on those docks, say in the year 1971?

A 1971? You can't estimate what a superintendent works. Simply for the fact that you you could have a superintendent on a pier that works, say, 8 to 1 or 12 to 5 --

Q I'm talking about you.

A Let me finish. You asked me the question. May I, please? I'm trying to tell you. You can work on a pier such as Mormac in Brooklyn -

THE COURT: He is asking how many hours did you work on the pier?

THE WITNESS: I don't know. In 1971?

THE COURT: Yes.

THE WITNESS: I have no idea, sir.

Q A day?

THE COURT: He has no idea, he says.

A I have no idea. It depends on where I was, sir, at the time that you are talking about. What pier I was on. That's what I'm trying to say.

Q Did you, sir, work at the marine terminal for Universal Stevedores?

A In Bayonne?

MR. LASSOFF: Military Ocean and Terminal?

MR. SCHULTZ: Yes.

A Yes, I did.

Q Is that the terminal you worked at?

A At the time of the accident?

Q And before that.

A For a few months prior to that, yes. I worked in Brooklyn prior to that, or rather in Port Newark or Port Elizabeth, whichever side of the canal you are on. Prior to that.

Q How long were you with this terminal that you were at just before the accident?

A About three or four months.

Q Before that you were located where, in Port Newark?

A Port Newark, yes, sir.

Q How many piers did your organization have the contract for?

A A dozen, fifteen.

Q How many piers did you work on at Port Newark?

MR. LASSOFF: At one time or at any time? I don't understand.

MR. SCHULTZ: Judge --

THE COURT: I don't know. What do you mean how many piers did he work on?

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MR. SCHULTZ: I asked him during the year 1971--

THE COURT: How many different piers did he work on during the year --

MR. SCHULTZ: Or had he worked at one or two particular piers?

A The best of my recollection during 1971 it was two piers. Meyer Line and Port Newark-- I can't remember the shed number,and the Bayonne.

Q In those two piers---

A 1971, wait a minute now. No, wait a minute. '71. No. Only in Port Newark. 1972 I went to Bayonne. 1971 was only the one pier. That was Port Newark.

Q And the one pier that you worked on in 1971, how many hours a day did you work on that pier?

A It varied. Anywhere from 8 to 16 to 18 hours a day. Depending upon what you had on the pier.

Q Were there some days that you would not work more than four or five hours?

A Never happen. Never.

Q Sir, is there such a thing as a card in the union, the union card, a seniority card?

A Yes.

Q Is there such a thing that you can go in and sign in and then not work and be paid for it?

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A Are you --

MR. LASSOFF: Objection, your Honor, this man is not a member of the union, he is a supervisor. He has nothing to do with that.

THE COURT: I gather he is not a member of the union.

MR. SCHULTZ: I will find out.

Q Were you a member of the union?

A No, never was.

Q You were managing?

A Absolutely.

Q You did not have the benefit of that seniority rule that was in effect?

A No, superintendents are completely separate from the longshoremen. I believe it was the federal government mandated that. The Bi-State Commission mandated that we could not be union members. The Waterfront Commission mandated that we could not be members of the union.

THE COURT: Is this a good time for you to recess, Mr. Schultz?

MR. SCHULTZ: Yes, I'll be quite a while yet.

THE COURT: You are excused to tomorrow morning at ten o'clock.

(Witness excused)

(Jury excused.)

MR. SCHULTZ: If your Honor please, I'm not familiar with your practice. Do the respective attorneys keep the exhibits that they have introduced or does the Court keep them?

THE COURT: Whatever you wish to do. I have no practice.

MR. SCHULTZ: I would just as soon have the clerk keep them.

THE COURT: I have absolutely no practice in that regard.

How much longer will you have with the witness?

MR. SCHULTZ: Probably another half hour to three quarters of an hour. I shouldn't be much longer than that, I don't think.

THE COURT: Mr. Lassoff?

MR. LASSOFF: I have Dr. Friedman at ten o'clock tomorrow, your Honor. I have Larry Kaplan at two o'clock. And in between, if we get there, which is doubtful, I have other witnesses to piece in and out.

THE COURT: Who's Friedman?

MR. LASSOFF: He's the orthopedist that Mr. Standard's office sent the plaintiff to. Arthur Friedman, in May of '73.

MR. SCHULTZ: There are two attorneys, Harolds, Standard, Weissberg and Heckerling. Heckerling apparently

sent him to this Dr. Friedman.

THE COURT: No treating doctor, aside from the first one?

MR. LASSOFF: The treating doctors are in Florida, your Honor. He received no treatment except surgery. I mean basically the hospital record shows some physiotherapy, but the only treatment he received here really was from Dr. Spitz, and everything else is physiotherapy in the hospital. And there's consultations by a dozen doctors but nobody treated him.

THE COURT: I gather you will be finished with the plaintiffs' case tomorrow?

MR. LASSOFF: No way, your Honor. I may be finished by Thursday, I may.

THE COURT: Wait, wait. In my chambers you and Bayer said this was a two- or three-day case. You told me. I go into Part I on Monday.

MR. LASSOFF: We'll finish Friday. There's no question. The reason we said that is the defendant has one doctor and the bus driver.

MR. SCHULTZ: Two doctors.

MR. LASSOFF: You're going to bring in Baird from Florida?

THE COURT: Just a second. You said you had a two-

or three-day case for both sides. Today's the first day, tomorrow is the second day. You tell me now you're going through Thursday.

MR. LASSOFF: I will be finished basically tomorrow except for a couple of witnesses and an economist. The economist is here only for purposes of inflation as against the discount. If Mr. Schlutz is willing to concede on inflation, I won't use the economist. He's prepared to come in and say the annual rate of inflation is six percent a year. I think the discount rate has traditionally been five.

THE COURT: The jury picks whatever discount rate it wants.

MR. LASSOFF: That's true. If we can get a concession, I won't use the economist.

THE COURT: You want the present value of the dollar charge?

MR. SCHULTZ: Yes, sir.

MR. LASSOFF: Then I have to use the economist, your Honor, I'm sorry.

MR. SCHULTZ: If your Honor please, I'd like the Court to know that I was not privy to any arrangement as to number of days.

THE COURT: Oh, you are bound by it, my friend. When I call a conference, the rules of this Court say the

person who is responsible for the case appears. If Bayer appears I assume he was responsible for the case and you're bound by what he said.

MR. SCHULTZ: It's just this, your Honor, the pretrial order shows that I have at least three witnesses.

THE COURT: Mr. Bayer in the pretrial conference in my chambers a month ago--

MR. LASSOFF: About six weeks ago.

THE COURT: Six weeks ago made a commitment to me. He was the man who came in in response to the request for a pretrial conference, that this case would be a two-or three-day case. I go into Part I on Monday.

MR. SCHULTZ: If your Honor please, I think it's only fair, if he is going to take Tuesday, Wednesday and Thursday and my pretrial order purely states that I have three witnesses--

THE COURT: Your pretrial order is dated May of 1975. I'm talking about a pretrial conference before me personally in December, six weeks ago.

MR. SCHULTZ: It's still, sir, I have three witnesses, and they're--

THE COURT: Mr. Bayer and Mr. Lassoff said a two-or three-day case. That's why I put it down.

MR. SCHULTZ: Sir, if your Honor please, if it is

a two-or three-day case and he takes two and a half days, that's certainly not fair to the defendant.

MR. LASSOFF: As I understand it, you have two doctors and the bus driver.

MR. SCHULTZ: Just a moment.

THE COURT: I'm just telling you what Mr. Bayer told me.

MR. SCHULTZ: Agreed, sir.

THE COURT: That's all I know.

MR. SCHULTZ: I know, but if your Honor please--

THE COURT: I'm sorry. I bring lawyers before me to set cases down for trial. I don't have time to have a luxury of a week-or two-week trial at your own convenience. I must know exactly the amount of time because I have other commitments that are made. And you're bound by it.

MR. SCHULTZ: Sir, the point is if the plaintiff takes two and a half days of a three-day trial--

THE COURT: Mr. Bayer made the commitment. I asked Mr. Bayer in my chambers how long this case was there, Mr. Lassoff was there, two to three days. I gave you four as it is.

MR. SCHULTZ: If your Honor please, it just seems to me if we have--

THE COURT: It just seems to me that you should have

been at the conference if you want to have it the way you are talking.

MR. SCHULTZ: It's not that, your Honor. He's taking two and a half or three days of a three day trial.

THE COURT: All I know is what Mr. Bayer said; who represents the defendant in my book.

MR. SCHULTZ: I understand that, sir, but--

THE COURT: I can't help that. I have to do what the lawyers tell me to do and then I have to have a tight schedule. They knew I back up cases one after the other for months in advance and I cannot let you go beyond the time scheduled. If Bayer thought he was going to take what he was going to take, he had no right to say two to three days. He should have asked him in front of me, how long is his case going to be. Not a word. He knows what your pretrial order said.

MR. SCHULTZ: Sir, what you're saying is, your Honor, that--we'll face it tomorrow.

THE COURT: Next time you show up if you want to have your way. Don't send somebody else.

MR. SCHULTZ: I only got this on Christmas.

THE COURT: That's your problem, that's not mine.

(Adjournment was taken to January 14, 1976, at 10 a.m.)

THOMAS J. CHIARELLO and
ANGELA CHIARELLO,

v. 73 Civ. 2962
75 Civ. 1956

DOMENICO BUS SERVICE, INC.,
and HENRY GIRDWOOD,

New York, N. Y.
January 14, 1976
10 A. M.

(Jury in box.)

MR. LASSOFF: Your Honor, may we put Dr. Friedman on?

THE COURT: Are there any witnesses you are going to call? If so, get them. I hope to finish today.

A R T H U R F R I E D M A N, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Are you a physician duly licensed to practice medicine in the State of New York?

A Yes, sir.

Q Do you maintain an office for the practice of your profession?

A Yes, sir.

Q Where is your office?

A It is in New York City, at 14 East 90 Street.

Q Doctor, would you tell the court and jury your professional training, education, hospital connections, specialties?

A Yes, sir. I graduated from the Hahnemann Medical College of Philadelphia, 1952. I then entered one year internship at the Beth Israel Hospital in New York City, then a four year training program in the field of orthopedic surgery, performing my residency in orthopedic surgery in New York at the Hospital for Joint Diseases. This was from the period of 1953 through 1957, and upon completion of that training program I was commissioned as a medical officer in the United States Public Health Service, being stationed at their hospital in Staten Island and being the chief of orthopedics at the hospital in Staten Island, at this public service hospital.

Upon completion of that two year tour of duty, I entered the private practice of orthopedic surgery in New York City in 1959, and my offices are in Manhattan, at 14 East 90 Street.

I am on the staff of the hospital for join diseases. My appointment is that of an associate attending in the department of orthopedic surgery. I am on the staff

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of the Beth Israel Hospital, also in New York City, and, similarly, I am in the department of orthopedic surgery as an associate attending; I am the orthopedic consultant of the Beth Abraham Hospital in the Bronx; I am on the faculty of the Mount Sinai School of Medicine in the Department of of Orthopedic Surgery. My faculty appointment is that of an assistant clinical professor in the department of orthopedic surgery.

I am a diplomat of the American Board of Orthopedic Surgery and a Fellow of the American College of Surgeons, a member of the Association of Military Training Surgeons of the United States, and I restrict my medical practice to the field of orthopedic surgery.

Q Doctor, did there come a time when you examined the plaintiff, Thomas Chiarello?

A Yes, sir.

Q When was that?

A At my office for the first time on May 14, 1973.

Q What examination did you make of Mr. Chiarello?

A Well, I made an orthopedic evaluation of certain injuries that he had sustained in an automobile accident --

MR. SCHULTZ: I move to strike it. This is not a treating doctor; this is an examining doctor who, as I understand the evidence, examined the patient, who was sent to him

by a lawyer, and I think he should be limited to what he found on his examination.

THE COURT: He is entitled to tell what the patient told him of his history in connection with the examination. Objection overruled.

A This was in conjunction with an automobile accident that he had been injured in on June 30, 1972.

THE COURT: He claims he was injured. You were not there.

THE WITNESS: No, that is correct, your Honor, a claim of an automobile accident of June 30, 1972, at which time he was driving a car, which was struck in the rear by a bus, causing him to sustain an injury to the neck and upper back regions, what we call the cervical spine, and also an injury to the lower back region that we call or designate the lumbo-sacral spine, with the onset of pain in these areas, with associated pain and stiffness both in the neck and upper back pain, and stiffness in the lower back, and eventual radiation of such pain from the lower back to the right lower extremity, which is the right leg.

The patient had been treated by various physicians since the episode of June 30, 1972, treatment including various X-rays and examinations, various modalities of physical therapy. He also had undergone a myelogram due to the fact

that there had been persistent pain without any relief.

MR. SCHULTZ: Your Honor, at this time I am going to press my objection and move that all this be stricken. This is not a treating doctor. As I understand the rules, the treating doctor is permitted to give a history and their hearsay sources, but not examining doctors who are here solely for the purpose of testimony.

THE COURT: Objection overruled.

A (Continuing) Due to the fact that he had not improved and was continuing to have pain, both in the neck and lower back region and severe pain in the right-lower extremity, right leg area, he underwent certain diagnostic procedures, including electrical diagnosis procedures, which are called electromyelography. He also underwent a special type of X-ray procedure known as a myelogram, the myelogram being a specific X-ray of the spine and the spinal cord area after the performance of a puncture in the spine, so-called spinal path and the injection of certain fluids in the spinal canal which make themselves obvious on X-ray and fluroscopy, and after the completion of these various diagnostic procedures a diagnosis had been made by the doctors who were treating him at that time that he had a condition known as a herniated disc, or so-called slipped disc in the lower back. More specifically, this was in the

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area of L4, L5, which is the space occupied by the disc between the fourth and the fifth lumbar of the vertebral bodies and to coordinate with his complaints, which were mainly in the back and in the right leg.

These X-rays and myelogram did show some presence of the disc at L4, L5 on the right side.

Operation for the removal of the disc had been suggested to the patient by the treating doctors. When I saw him in May of 1973 the patient had not yet undergone operation; he at that time expressed a certain degree of fear of the operation, as he had heard from various friends and acquaintances that --

MR. SCHULTZ: If your Honor please, that is incompetent.

THE COURT: Overruled. You are going to have him on the stand and cross-examine him and see if he made the statement to this doctor. You are in the middle of cross-examining the plaintiff; you are going to have him back here.

MR. SCHULTZ: If your Honor please, for the purposes of the record the mere fact that he made this statement isn't the subject; it is whether he is competent to make this statement, and also repeating what some other people may have told him.

THE COURT: The statement is he was afraid to go

through the operation. That is admissible.

Go ahead.

A (Continuing) He expressed a certain degree of fear and apprehension regarding that major type of operation.

I also had information from the patient that he had not been able to work since his accident. He had complaints. In addition to the complaints of pain in the back and in the right lower extremity and in the neck and the right upper extremity, he had certain other complaints of anxiety, nervousness in relation to his injury, and the fact that he had not been able to return to work.

I then examined the patient at my office and I found at this examination --

Q May In interrupt you for one moment. In the course of seeing the patient did you review certain records?

A Yes, sir, I did.

Q Did you review the myelogram that had been taken at the Richmond Memorial Hospital?

A Yes, sir, I did.

Q You yourself looked at that?

A Yes, I looked at the actual X-ray plates of the myelogram that had been performed, and it was my opinion in review of the myelogram there was no question there was evidence of a slipped disc between the fourth and fifth

lumbar vertebral bodies, and I was suspicious that there might be one between the fifth lumbar and the first cervical.

I also reviewed certain hospital charts and medical reports as to findings of the other physicians who had been treating him from 1972 to 1973.

Q Tell us what your examination revealed to you?

A My examination revealed an individual who had complaints, which included the pain in the right upper back and lower back, pain in the right arm, pain in the right leg. In association with these pains, the patient had certain complaints of numbness and abnormal sensations, sort of electric shock sensations both in the right arm, and, more specifically, in the right leg. He complained of numbness and tingling of the right foot, the right toes. All his symptoms were aggravated by any attempt at physical activity, such as standing, walking, bending and lifting. He also had complaints aggravated by prolonged sitting. He was not able to sit for any prolonged period of time without having a great increase in pain.

He had great difficulty standing and walking, and was using a cane when walking.

When I examined the patient I found that he walked with a marked right-sided limp, in other words, he was favoring the right leg. It was necessary for him to use a cane

when he walked, and if he did attempt to walk without a cane, the limp was even more pronounced. I found that there was a certain degree of weakness in the muscles of the right leg and right foot. I found that there were certain areas of loss of sensation or feeling in the right foot, right leg, right ankle area.

I found on examination that there was a certain degree of tenderness and limitation of movement in the neck and upper back regions. There was a condition known as muscular spasm, which is an abnormal contraction of muscles, or tightness of the muscles. This was also in the neck and upper back regions.

I found that the shoulder motions on the right were somewhat restricted. In examination of the lower back region, I found there was a definite degree of tenderness and spasm, abnormal muscle contraction and limitation of motion. In other words, when I asked the patient to perform certain movements of the back, such as bending forward, backward, from side to side, he was unable to do, or if he was able, it was considerably restricted and caused him a good deal of pain, both in the back and in the right leg.

In my examination of the right leg I found certain findings from a neurological standpoint, including muscular weakness of the foot and ankle. In other words, he was

unable to perform certain movements of the foot and ankle on the right side. When I asked him to bring the foot and ankle up, he was unable to do that with the amount of force that he was able to do it on the left side. I also found weakness in the toe muscles. In other words, when I asked him to do certain movements with the toe, particularly the big toe, he was unable to do this on the right foot. He was able to do it on the left foot.

There was an absence of the right ankle jerk, which is one of the reflexes we test for with a hammer. On the right side the ankle jerk was absent; on the left side it was there and quite strong.

All these neurological findings would indicate the presence of an abnormal condition in the nerve pathways, the nerve that stimulates the muscles to move, and, obviously, they had been injured and were inflammed.

I found tenderness in the hip area, the back portion of the hip and the buttock, the back portion of the thigh. This is the region anatomically where the sciatic nerve runs; this is the main nerve which operates and enervates the muscles of the leg. This nerve starts from certain nerve roots in the lower back and travels to the hip and thigh area and enervates, like an electrical system, the region of the leg down to the toes.

I have found that there was a certain degree of atrophy or shrinkage of the muscles of the right leg, which measure a half inch less in circumference than the muscles of the left leg. This also would indicate the fact that there was injury to the nerve roots.

I notice the patient had great difficulty when asked to get on and off the examining table and complained of pain in the lower back, with the fact that this pain traveled or radiated in the right leg. I then performed certain X-rays at my office.

These were X-rays of the cervical spine, the upper back region, the neck region, also X-rays of the lower back region. I also reviewed, as I mentioned earlier, X-rays that were brought in to me by the patient, which included a certain group of X-rays that were taken subsequent to the injury of 1972.

Included among the X-rays which I reviewed was that of the myelogram which had been performed. In review of all these X-rays, including my X-rays and the myelogram that was performed, and in reviewing what I found on examination of this patient, I came to the conclusion or the diagnosis that this patient had sustained certain injuries, both to the neck and upper back, but more significantly from the standpoint of his orthopedic status, to the lower back

region, where I felt he had sustained, without question, an injury to the lower back in the nature of a slipped disc, and, specifically, in view of the findings I made on my examination and in view of the X-ray studies and the myelographic studies, that there was a presence of a slipped disc between the fourth and the fifth lumbar areas.

There was also a suggestion, though and this was only a suggestion or suspicion from a clinical standpoint, that there may be another slipped disc at a lower level, between the fifth lumbar and the first sacral.

As far as these injuries are concerned, I felt that this was the reason he was having pain and stiffness in the lower back and pain in the right leg and was unable to move about or walk. It was also the reason that he had a certain degree of weakness of the muscles of the right leg and the loss of sensation. It was also the reason that he had the positive findings of the myelogramand the reason that he had the positive findings on the electrical tests that were performed.

As far as the injury to the upper spine area, the neck, it was my opinion that this was primarily in the nature of a sprain of the muscles and ligaments of the upper back region, with also some degree of nerve root inflammation and impingement. There had never been any cervical myelogram,

although I understand by history that there had been an attempt to do one, but there was never conclusive evidence that there was a slipped disc in the cervical spine area.

It was my opinion in view of the fact that this patient had continuing pain in the back and in the right leg for a period of approximately a year, since the injury, and the fact that he had not improved, and in fact, he had gotten progressively worse, that the only recourse left to him was to have an operation, the operation being an operation to the lower back region with removal of the slipped disc.

Q Before you go further, would you explain to the jury what a disc is and what the operation is when you operate to remove a disc?

A Yes, sir. The disc is a normal structure in the spine. It is a piece of gristle or cartilage that is rather soft and elastic, almost like a sponge and serves as a cushion or a shock absorber between the portions of the spine, the harder portions of the spine, which are known as the bones and the vertebral bodies. They occupy a certain amount of space in between the bone structures, approximately in the lower back, a half an inch to three quarters of an inch in thickness.

In the presence of an injury to the lower back of a severe enough nature, a portion of the envelope that

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encloses the disc material will open up or be torn, and the portion of this gristle, this soft, spongy stuff, will escape from a hole in the envelope and cause pressure on the nerves which surround the disc.

As I mentioned, there are certain nerves in the lower back region which travel out of the spinal cord through certain holes in the spinal canal. In the region of the disc they travel in quite close approximation to the disc, and, therefore, any abnormality of the disc or deviation of the disc, or even a portion, it squeezes out almost like the equivalent to a piece of toothpaste being squeezed out of a toothpast tube, and will cause actual mechanical pressure, squeezing of the nerve root right next to it. This will cause the nerve root to become swollen and inflammed; it will cause the formation of a certain amount of scar tissue or adhesions that take place between the nerve and the disc area, and this in consequence is the cause of the pain in the back and the pain in the involved leg, here it being the right leg.

Q Doctor, you mentioned the words muscle spasm that you found on your examination both in the neck and the back. What does muscle spasm really do?

A Well, most muscle spasm is nature's way of splinti the spine, sort of immobilizing the spine; it is nature's

response to a painful or injury situation.

Q In other words, it is a form of protection so you can't move that area freely?

A Yes.

Q Now, incidentally, at the time you did this examination, Doctor, your records reveal, do they not, and that this man was a pier superintendent?

A Yes, his occupation prior to his accident was that of a pier superintendent, and as I mention, he had not been able to return to work or any work since the accident.

Q Doctor, I show you the operative report from the Golden Isles Hospital in Florida, Plaintiff's Exhibit 6. I ask you to read that and explain to the jury what was done there for Mr. Chiarello in the hospital?

A This was an operation that was performed on December 5, 1973. The operation included an incision, an opening up of the spinal area in the lower spinal region over the lower lumbar region, from the area of the third to the fifth lumbar vertebral bodies. This is in the area just below the hollow of the spine, the small of the back, extending almost to the area just in the region of the cleft, in the region of the buttocks.

The operation, of course, includes opening up of the various anatomical structures and skin, the various

ligaments under the skin, and the removal of the muscles from the bone actually, so that the spinal canal, which is bony hard, can be exposed, and then with certain other instruments, opening up and removing of portions of bone so as to enter the space where the disc is.

I see in this operative report that there was a covering over of the disc performed, and the findings of the operating surgeon were that there was the presence of a slipped disc, a herniated disc at L4 and L5, and that there were adhesions and scarring around the nerve root, which he identified, and it was necessary to dissect these actually with instruments, and when he was able to do this he noticed the fact that there was bulging and free disc material. These are the classical findings in an operation of a slipped disc.

The doctor then removed the involved disc with various instruments and made certain openings in the bone and the region of the spinal cord to allow the nerve root to be free, since it had been bound down or scarred down by the adhesions. He notes here the nerve root was seen to be marked adherent with scars and frayed.

Then the area of the operation was closed up. He had removed a significant amount of disc material. The patient had lost a certain amount of blood during the operatio

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and there was replacement of a certain amount of blood with transfusion.

Upon completion of the operation, enclosure of the operative area, a dressing was applied and he was returned to the recovery room.

Q During that operation, Doctor, was there a tear in the dural sleeve?

A Yes, sir, the operating surgeon mentions this, and this would be, I feel, in relation to the fact that there was so much scarring of the involved nerve root.

Q What is the dural sleeve?

A The sleeve over the nerve as it exits from the spinal cord. It is a sort of a protective envelope, you might say, or container for the nerve, and apparently in his operation, in trying to free up the scarred and adherent nerve, there was produced a small opening in the sleeve, which it was necessary to close with a single suture.

Q Doctor, does the fact that the operative report indicates marked scarring and adhesion have any significance to you as an orthopedic surgeon?

A Yes. It suggests, number one, that there was a significant injury at the time of the episode of 1972; there was a certain amount of hemorrhage that took place in the region of the nerve root and slipped disc. In other

words, in order to get a certain amount of adherence and scarring there, it would be necessary for hemorrhage to have taken place in this region.

Q In or at the spinal canal?

A At the region of the spinal canal, in the region of the disc, in the region of the nerve root, and as a respons and in the healing process to hemorrhage there is the formation of scar tissue. It would also indicate from the standpoint of prognosis that even with the removal of the disc-- in other words, what the future holds for the patient is what I mean by "prognosis" -- even with the removal of the disc, anybody who had a certain familiarity with this condition would not expect that the patient would be cured, because scar tissue is, for the most part, an irreversible process; once it is there, it is there; it cannot be cured. And in natural history, scar tissue would only increase in time. So when one sees this at the time of operation, the fact so much scarring and adherence in the nerve root, one realizes that certainly the patient will not have a gratifying operative result.

Q Doctor, assume on June 30, 1972, Mr. Chiarello was stopped in his car on an approachway to the Bayonne Bridge, when he was struck in the rear by a bus and pushed ten feet into a car that was stopped in front of him, that the force

of the impact broke the seat in his car, causing it to fall flat and for him to fall flat on his back with it, that when his car then struck the car in front, he was tossed forward and draped over the steering wheel, that he came under the care of a Dr. L. Jackson Spitz, who diagnosed his injury as a low back derangement and an acute tortocollis, that he then went to the Richmond Memorial Hospital in Richmond, Staten Island, and to St. Vincent's Hospital on Staten Island, to a Dr. Urs, to a Dr. Leventhal, a Dr. Frank, a Dr. Friend, Dr. Lanier, and that he was then examined by you, that you found in your opinion that he was suffering at the time of your examination with a herniated or slipped disc and severe sprain of the neck and shoulder regions, in your opinion, Doctor, with reasonable medical certainty was this accident a competent producing cause of the injuries that you found?

A Yes.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A (Continuing) Yes, in my opinion it is a competent producing cause of the injuries and the conditions which I found.

Q Now, at the time you examined Mr. Chiarello did you have an opinion as to whether or not Mr. Chiarello can

perform his work?

A Yes, I had an opinion.

Q What was your opinion?

A My opinion was that at the time I saw him in May of 1973 he was completely and totally disabled; he was not able to do any work at all.

Q Now, Doctor, at my request did you examine Mr. Chiarello a week ago Monday, last Monday?

A Yes.

Q That examination took place in your office?

A It did.

THE COURT: That is, this Monday?

THE WITNESS: January 5, your Honor, 1976.

Q Did I go to your office with Mr. Chiarello?

A Yes, sir, you did.

Q Did we bring certain X-rays and records with us?

A Yes.

Q Did you look at the time of that examination at another myelogram that had been done to Mr. Chiarello subsequent to the operation?

A Yes, sir.

Q Will you tell us what your examination consisted of on January 5, Doctor?

A Yes, sir, my examination at that time consisted of

also an interim history, in which I obtained information as to the various treatments he had since I had seen him last, incldluing the fact that he underwent an operation in 1973 for removal of the slipped disc, which I described a few minutes ago, performed in Florida, and the fact that after the operation there was a minimal improvement for a short period of time --

MR. SCHULTZ: May I respectfully object on the same grounds that this is not a treating doctor and the repetition of the history obtained from this type of testimony is improper at this time.

THE COURT: Overruled. I don't see how a doctor can examine a patient without hearing from the patient what bothered the patient.

A (Continuing) The patient informed me that while there was a minimal improvement, there was less pain in the back for a transient or short period of time, that he continued to have complaints of pain in the back and right leg as he had before he had undergone the operation, and had even a greater amount of pain in the right leg. He still had some complaints of pain and stiffness in the neck and upper back region and in the right arm. He had some headaches, but his primary complaints were related once again to the lower back, and, more specifically, to the right leg,

where he complained of continued pain, stiffness, weakness of the leg; the leg would give way from time to time; he still required the use of a cane. It was necessary when he walked, as he described, to almost drag the right leg. All the pains in the back and in the leg were increased by certain physical activities, such as standing, walking, sitting, sneezing, caughing, sitting in the bathroom. He complained of actually an increasing amount of anxiety, nervousness, certain psychological complaints. He had certain complaints in relation to sexual function, in relation to fluid and bowel function; he also gave the history that he had not been able to return to any sort of work, and that after the operation there was an increase of pain. He required further care and treatment, both from the orthopedic surgeon who had been treating him in Florida and from the neurological surgeon who had operated on him, that he eventually underwent certain treatments with the use of an electrical stimulator, a dorsal stimulator. This is a new type of an electrical device, almost equivalent to a transistor radio, which is hooked up to the spinal area, the nerve areas, so that there can be an attempt to decrease the pain patterns or the pain stimuli from the back and from the leg. This was tried and it was only successful to a minimal degree.

However, he also underwent another operation

in October of 1974. This operation was in the nature of a Rhizotomy, a specific type of operation where the doctor cuts certain nerve fibers, actually tries to cut the nerve fibers, and this is almost a last resort, to destroy or hope to destroy those nerve fibers which control the pain in the leg and in the back. He had this operation performed, and there was, as he described it to me, a slight decrease in the amount of pain he had for perhaps two or three weeks, but that the condition had gone back following this second operative procedure to what it was before, and in view of this fact, he eventually had another myelogram performed in July of 1975, and the treating doctors upon review of this new myelogram suggested to him a third operation.

MR. SCHULTZ: Your Honor, I respectfully move that it be stricken.

THE COURT: Did you see the myelogram?

THE WITNESS: Yes, sir.

THE COURT: You can tell us what it showed.

MR. SCHULTZ: If your Honor please, your Honor excluded that yesterday.

MR. LASSOFF: There is an amended notice.

THE COURT: I have an amended notice before me.

MR. LASSOFF: It was done over a week ago.

A (Continuing) I reviewed the myelogram of July,

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1975, and there are certain abnormalities there at the area of the operation that Mr. Chiarello had, in other words, between the fourth and fifth lumbar regions, which are suggestive of either a new herniated disc, and this is possible to happen, or the formation of a significant amount of new scar tissue, which is also a likely thing to happen in such a patient. This would explain the fact that he had increasing amounts of pain in the back and in the right leg, and in view of this one must consider another operation, which would be a third operation, which would be an exploration of the involved area, removal of a new disc, if there is a new disc, or removal of scar tissue, and at the same time to perform a major procedure, known as a spinal fusion, which is a source of grafting.

6 You take certain pieces of bone in the hip areas, and we graft it into the area of the spine in the hope and in an attempt to form an internal splint in the spine, so there would be movement there, such movement aggravating the pain. This was the suggestion that was made to the patient by his doctors in Florida and this is the suggestion I still make to the patient, with certain reservations after I examined the patient and reviewed all the recent information.

Q Now, Doctor, prior to your examination did you have before you the complete record of the neurosurgeon in

Florida?

A Yes, sir.

Q Did you have before you the hospital records where the two operations had been performed?

A Yes, I did.

Q And you had the latest myelogram?

A Yes, sir.

Q Did you yourself take additional X-rays on January 5?

A Yes, sir, I did.

Q Doctor, the myelogram that you have recently examined, would I be correct in stating that from that myelogram you can't really tell if there is further herniated disc or scar tissue?

MR. SCHULTZ: I am going to object to any questions propounded with relation to a myelogram that is not in evidence.

THE COURT: Do you have the myelogram here?

Q Which is the myelogram you looked at, Doctor?

A This is it.

Q There appear to be numerous X-rays here?

A There are about 12 or 15 X-rays there.

MR. LASSOFF: I offer all these X-rays in evidence as one exhibit.

MR. SCHULTZ: May I have some voir dire, your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. SCHULTZ:

Q Did you take these myelograms?

A No, sir.

Q Do you know of your own knowledge by whom they were done?

A They were performed by the X-ray physicians, the radiologists, and Dr. Gervin, a neurosurgeon.

Q Is that of your own knowledge or what you have been told?

A What I have been told and also in reviewing the films there are certain names on the films.

Q You were not present when they were taken?

A No, sir.

Q Do you know exactly where they were taken?

A In the hospital in Florida. I think it is the Hollywood Memorial Hospital.

Q Do you know?

A If I may look at the X-rays.

Q Do you know of your own knowledge?

THE COURT: Show them to him. He has asked you

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to show them to him.

MR. SCHULTZ: Your Honor, the question is, does he know of his own knowledge?

THE COURT: He was not there. The Hollywood record is here.

MR. SCHULTZ: Not here.

THE COURT: Do you have the Hollywood record here?

MR. LASSOFF: It is here.

THE COURT: Well, put it in.

MR. SCHULTZ: You excluded it yesterday.

THE COURT: I have before me an amended notice of a pretrial order served on you a week ago. I will let it in under that amendment.

MR. SCHULTZ: If your Honor please, I objected to it yesterday.

THE COURT: I have now ruled that I will let it in.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Isn't it true you were served with an amended pretrial order a week ago? Weren't you served with an amended pretrial order a week ago?

MR. SCHULTZ: May I add to that that the amended pretrial order mentions only a myelogram, not the hospital

record.

THE COURT: So you know all about the myelogram?

MR. SCHULTZ: He claims he intended to put it in.

THE COURT: Where is your record?

MR. SCHULTZ: The notice contained nothing about the record, your Honor.

THE COURT: Did you receive a copy of the record?

MR. SCHULTZ: He did not.

MR. LASSOFF: I never had a copy of the record. I subpoenaed the record.

THE WITNESS: I have a record here, number 6.

THE COURT: No, that is the old one. They now tell us there are two Hollywood records. Hollywood record number 6 was back in December, I think.

THE WITNESS: Yes, sir.

MR. LASSOFF: Here is the record, your Honor. It is marked Plaintiff's Exhibit 7 for identification.

BY MR. LASSOFF:

Q You told us how a spinal fusion is done. What type of surgery is a spinal fusion?

MR. SCHULTZ: Objection.

THE COURT: Overruled. He said he would recommend the spinal fusion for the plaintiff. I assume that you are going to have some doctor here who can say that there

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are operative procedures which might cure this patient. He is entitled on his direct case to show what he has offered and recommended by done.

MR. SCHULTZ: I respectfully object, your Honor.

A A spinal fusion is a tremendous operative procedure it is a tremendous, large operative procedure in the presence of no prior surgery. In other words, when it is the initial surgery. The fact that the man had two operations, and this would be the third with scar tissue upon scar tissue upon scar tissue, would make it even a more major procedure with a long period of morbidity, recovery and so forth, anywhere from six months to a year.

Q The word "morbidity," Doctor will you explain that?

A Well, morbidity means illness, it means his physiological response to an operation. In other words, a smaller operation causes much less response. With a spinal fusion, it is necessary frequently to keep the patient in bed anywhere from three to four weeks; it is necessary to use some form of plaster or brace fixation or immobilization of the spine for approximately three to four to five months following the surgery; it is an operation in conjunction with an exploration of the involved space that we are concerned with here and removal of scar tissue and nerve roots that

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may last anywhere from four to four and a half to five hours, with considerable blood loss.

THE COURT: Do you recommend this?

THE WITNESS: In this particular case?

THE COURT: Yes, that is what the ballgame is about.

THE WITNESS: No, sir, I do not.

THE COURT: You do not.

Q Why not?

A As I mentioned earlier, I do not feel it will help this patient. I think one must weigh the effect of having to undergo a major, as I have described it, procedure, super-major procedure, with what benefit one would derive from it, and in this particular instance I would not recommend it because I feel it would be for the most part fruitless and an unrewarding gamble.

Q When you say fruitless and unrewarding gamble, are you referring to pain now?

A Yes, pain and disability.

Q Doctor, if this operation were performed would it remove Mr. Chiarello's pain in the back and leg muscles?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Not in my opinion.

Q Can you tell us why not in your opinion, Doctor?

A The fact that he has had his condition for three and a half years, almost four years. In other words, the longer the condition is the poorer the prognosis and the results of such major procedure. The fact that he has undergone two prior procedures with very unrewarding results --

THE COURT: Two prior procedures being what?

THE WITNESS: The removal of the disc, and the second one was the Rhizotomy, with no significant improvement. If anything, it may be somewhat worse, and the most significant finding of all, the fact that in the initial operative procedure there was a large amount of scar tissue and adherence around the nerve root. It would be my opinion if I were treating this man that to undertake such a procedure would be rather brave, and while I mentioned, it may also be a last resort procedure, it would most likely within reasonable medical certainty not improve him and possibly make him worse.

Q Doctor, based on your initial examination, the records that you reviewed before that examination, and your second examination, the records and myelogram that you have reviewed, the operative reports, in your opinion, Doctor, with a reasonable certainty would Mr. Chiarello's condition remain the same, improved, or get worse?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I think it will remain the same, and possibly get worse.

Q Do you see any chance for improvement?

A No, sir.

Q Doctor, will you tell the jury what is a Rhizotomy and how is that done?

A This is a specific and fairly recent operative type of procedure which is performed under X-ray control with certain electrical devices and needles in order to destroy certain nerves in certain parts of the spine, certain joints of the spine. These joints of the spine are called the joints of Lushka. Of course, it had to be done in a hospital. The patient is not asleep during it, because he has to make certain responses and under X-ray control to make sure it is in the right space and in the right joint that you perform this operation and destroy and cut certain nerves.

Q Is this type of surgery what is done in terminal cases of spinal cancer?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q I believe in the records, Doctor, there is a mention of Rhizotomy and some other kind of tests being

performed?

A Yes, there was also a fairly recent type of procedure performed, known as a transaxial tomography. It is an unusual and specific type of X-ray which is now performed, and this was performed in Florida at the Mount Sinai Hospital and the results were --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Why?

MR. SCHULTZ: First of all, those records are not in evidence.

THE COURT: Where are they?

MR. LASSOFF: I believe the X-rays may be here.

THE WITNESS: They were in the other day.

THE COURT: When did this take place, Doctor?

THE WITNESS: This other procedure was performed sometime in July, I believe,of 1975; either June or July of 1975.

THE COURT: Where?

THE WITNESS: At the Mount Sinai Hospital in Florida.

MR. LASSOFF: There was no admission, your Honor.

THE COURT: I have a record here from the Memorial Hospital, 7. Is that in evidence?

MR. SCHULTZ: There was one in October of 1974

and one in July of 1975.

THE COURT: Didn't we have a dispute on that yesterday and didn't you agree to let in the early admission?

MR. SCHULTZ: Yes.

THE COURT: Isn't that all that is contained in Exhibit 7, the early admission?

MR. LASSOFF: Unless we have two 7's.

MR. SCHULTZ: One was marked 7 in evidence and the other for identification.

MR. LASSOFF: We have two 7's. That should be 8.

THE COURT: There can't be two 7's, Mr. Lassoff.

MR. LASSOFF: I agree.

THE COURT: Where is 7?

MR. LASSOFF: I will find it over here.

THE COURT: That is the one in evidence?

MR. LASSOFF: Yes.

THE COURT: Mark the other one 7A. It should not be in evidence.

xxx (Plaintiff's Exhibit 7A marked for identification.)

THE COURT: Now, 7A does not come in; it is not mentioned in your amended order.

MR. LASSOFF: I offer 7A in evidence.

THE COURT: Denied. It is not set forth in your amended order.

MR. LASSOFF: I didn't say it was, your Honor.

THE COURT: I am not going to let it in. That knocks the myelograms out.

MR. LASSOFF: No, the myelogram is listed.

THE COURT: That is all, just a simple myelogram, but he needed more than a simple myelogram, he needed the hospital record to identify it. My friend, you slipped up. The myelogram is out. Take it back.

MR. LASSOFF: The myelogram itself has both the name of the hospital and the patient's name.

THE COURT: Yes, but you need the record of the hospital with it to show it was taken and what was found. This has been done in court umpteen times.

Q You were telling us about a tomogram. What is that?

A It is a specific type of X-ray study in relation to the small joints and the nerves around the small joints of the spine, and this was performed -- I had these X-rays here a few minutes ago -- at the Mount Sinai Hospital in Florida, in Miami.

MR. SCHULTZ: I am going to object to any testimony as to that.

THE COURT: No testimony on that, Doctor. Those records are not in evidence.

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MR. SCHULTZ: I move it be stricken.

THE COURT: Sustained.

MR. LASSOFF: I was going to ask about it.

THE COURT: The record is not in evidence.

Q Now, Doctor, did you yourself take X-rays when you examined this man?

A Yes, sir.

Q On January 5 of 1976?

A Yes, sir. Do you want me to review the X-rays?

Q Review the ones you took initially and tell us what changes, there are, in the subsequent X-rays.

A These are my X-rays that were taken originally in May, 1973.

MR. SCHULTZ: May we have a side bar conference, your Honor, at this point.

THE COURT: You may.

(At the side bar.)

MR. SCHULTZ: I believe I made a mistake, and perhaps everybody did. I am not sure. I see no listing for Dr. Arthur Friedman to be called.

MR. LASSOFF: It is a Howard Friedman. It was just a mistake.

MR. SCHULTZ: I don't see any Arthur Friedman.

THE COURT: He says that you have had his report,

you know his name.

MR. SCHULTZ: He handed me a report yesterday.

MR. LASSOFF: Not that one, the one in 1973.

MR. SCHULTZ: I don't know if I have seen that.

MR. LASSOFF: Your office has had it.

MR. SCHULTZ: He handed me a report of Arthur Friedman yesterday.

THE COURT: What about the report he says he gave your office?

MR. SCHULTZ: I will go through my reports.

THE COURT: Do it now.

MR. SCHULTZ: I don't see this man's name. May I check it.

(In open court.)

THE COURT: We will take a short recess.

(Recess.)

MR. LASSOFF: With the court's permission, may I take Dr. Friedman off the stand for a minute and have the plaintiff testify as to how the myelograms got here?

THE COURT: Of course not.

BY MR. LASSOFF:

Q Doctor, will you tell us about the X-rays?

A Yes, sir. I am particularly talking about the X-rays of 1973.

MR. SCHULTZ: So the record is clear, has your Honor ruled on my objection with relation to the doctor?

THE COURT: Certainly I did, before the recess.

A These are X-rays of the spinal column, the upper spinal column, so-called neck. This is our profile view. This was taken in my office on May 14, 1973, of Mr. Chiarello's spine.

Now, this is a side view. I also have a frontal view here. One is taken from the front. This is the profile view. You can see the skull, and these are the bones of the vertebral bodies. There is no evidence here of any fracture or dislocation. There is some flattening of the spine. There should be much more of a hollowing in here. There is the back. The front should be more hollowed out, more concave than that.

MR. SCHULTZ: Excuse me, sir. I am going to object to the use of any X-rays by this doctor. I see none listed in any of the reports or the pretrial orders that he is going to use X-rays.

THE COURT: Do you have a copy of his report of 1973?

MR. SCHULTZ: No, sir.

THE COURT: Did you furnish it to Mr. Bayer?

MR. LASSOFF: Yes, I did.

THE COURT: Go ahead.

A What I see here is there is not the usual amount of hollowing out in the back portion of the spine, which indicates a flattening of the spine, which would indicate a condition of muscle spasm, tightness.

These are also X-rays of May 14, 1973. These are X-rays of the lower spine, the so-called lumbo-sacral spine. These blocks are forms of the vertebral bodies, and this is the frontal view, and this is the side view.

Now, what we see in these X-rays, there is no evidence of any fracture or dislocation. There are some flecks here, small white fleck material. This is the spinal cord region back here where these holes are, and this is the pantopaque, which oily material which was injected at the time of the myelogram. Most of it removed, but there is a slight amount that remains. These are the spaces where the disc is. This so-called empty space really isn't empty; it is filled with gristle and cartilage and a jelly like substance. This is the involved disc, the fourth and the fifth. This is between the fifth and the first sacral. Also here, as in the upper spine, and even more obvious, there is nothing normal amount of hollowing out that one would expect to find. The spine is more flat than it should be from a side view.

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Q Doctor, would a herniated disc show on an ordinary x-ray?

A No, sir.

Q This is the reason for the special test with the pantopaque?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q What is the reason for the special X-ray?

A The reason is the injection of a certain type of contrast material into the spinal cord to show whether there is abnormal pressure on the nerve due to a slipped disc. You would not see it on an ordinary film. Ordinary X-rays show only the bones and hard structures.

This is, once again, an X-ray of the upper spine, the neck area, taken on January 5, 1973, the same patient, a profile view. Once again we see the flattening, not the normal amount of hollowing out, indicating a condition of spasm. These are X-rays of the lower spine, frontal view. This heavy white substance, which is quite heavy here and streaky in here, is the remains of the last myelogram they did in July of 1975, and, obviously, they were not able to remove the oily substance, and it is still there in the spinal cord. And it is even more obvious when you look at this view from the side. This is the spinal column from the side.

These blocks of bone are the vertebrae, all straight, which they should not be, and the whitish streaking stuff back here is the oily substance of the myelogram and the flattening shows the spasm.

Q Can you tell from looking at your new X-rays, Doctor, whether or not another myelogram had been performed after the one that you saw in 1973?

A Oh,yes, there is no question about it. There is more oily substance, which there wasn't in 1973.

Q Doctor, in your opinion will Mr. Chiarello ever be able to return to his occupation?

A No, sir, in my opinion he will not ever.

MR. LASSOFF: No further questions.

MR. SCHULTZ: I believe that those X-rays that were just displayed were not placed in evidence. I think they should be.

THE COURT: Offer them, Mr. Lassoff.

MR. LASSOFF: I will offer them in evidence. I did not offer them because they are not marked as exhibits. But I will.

THE COURT: Then why don't you offer them? Why did you have him testify if they don't go into evidence?

MR. LASSOFF: I had him reading as an expert on X-rays he took himself. The jury is not expert on reading

X-rays. I wanted the doctor to testify as to what the X-rays meant.

THE COURT: Are you offering them in evidence?

MR. LASSOFF: I will offer them in evidence.

MR. SCHULTZ: I object.

THE COURT: Sustained. All testimony regarding the X-rays is stricken.

You may cross-examine.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q Doctor, you have never been known by the name Howard Friedman?

A No, sir.

Q Doctor, when you first examined Mr. Chiarello back in May of 1973, could you tell us the circumstances under which he came to your office?

A An appointment was made by his attorney for me to examine him in order to ascertain his injuries and what his condition was.

Q Now, Doctor, who was that attorney that arranged this examination for Mr. Chiarello at that time?

A It was the office of Standard, Weisberg, Heckerling and Rosow, 38 Park Row.

Q Now, Doctor, when you were stationed in this

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United States Public Health Service Hospital in Staten Island did you treat their merchant seamen?

A Yes, among other patients.

Q Did you also treat stevedores and longshoremen at that place?

A Not too often, except in extreme emergency. In other words, stevedores and longshoremen I don't think are eligible for Public Health Service treatment, unless it is an extreme emergency, and that is the closest hospital they have.

Q The United States Public Health Service, would you say that primarily treated merchant seamen?

A I don't know the statistics. We treated merchant seamen and we treated members of the coast guard, we treated army members, because we were just adjacent to Fort Wardsworth; we also treated certain federal employees who were eligible for treatment at the hospital.

Q The great number of patients you saw there were merchant seamen?

A I would say 50 percent, at least.

Q Now, had you had a prior relationship with the office of Standard and Weisberg?

THE COURT: What do you mean relationship?

Q Had you examined other patients or clients of

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theirs on prior occasions?

A Prior to when, sir?

Q Prior to May of 1973?

A Yes, sir.

Q In fact, sir, had you examined merchant seamen that they were representing as plaintiffs?

A I would imagine from time to time, yes.

Q You examined those people in order that you might send reports to these attorneys and then subsequently testify?

A I would render reports. It was not always that it would be necessary or that I would testify. As I mentioned it was an evaluation of their injuries.

Q But itwas also implied and understood thatyou might have to come and testify?

A Yes, from time to time that was implied.

Q Sir, have you testified on prior occasions? Have you testified to the office of Standard, Weisberg, and Heckerling?

A Yes, on a few occasions I have.

Q And you have testified as a result of these examinations that you made in their behalf?

A That is correct, sir.

Q Sir, you were asked to examine this particular plaintiff by Mr. Heckerling? Is that correct?

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A That is correct.

Q The purpose of your examination was to render a report to him and possibly testify?

A That is correct.

Q Did you ever treat this patient?

A No, sir.

Q Sir, when you examined this man -- may I see that report incidentally and your records, if any? Do you have any records of your examinations?

A Yes, sir.

Q Is this all you have?

A I can give you the whole chart.

Q Now, I just want to know if these are the records?

A These are the records that are pertinent to May of 1973.

Q Now, Doctor, in May of 1973 did you an ankle jerk test on this man?

A I believe I did.

Q On the right?

A Yes.

Q Did you do a knee jerk on the right?

A Yes.

Q What did you find? Do your records show?

A Can I have that?

Q Yes, sir.

A Right ankle jerk depressed to absent.

Q In 1973?

A May 14, 1973, yes, sir.

Q Did you an ankle jerk test in January of 1976?

A I believe I did. Absent.

Q That was in January?

A January 5, 1976.

Q No right ankle jerk at all?

A That is correct.

Q Now, Doctor, have you ever performed a Rhizotomy?

A No, sir.

Q Sir?

A No, sir.

Q Have you ever seen a Rhizotomy performed?

A Yes, sir.

Q You have never done one?

A Not at our hospital. They are generally done by neurosurgeons since it is considered a neurosurgical procedure. I have referred patients for it. I have watched it. But I have never actually performed it. It is not considered in our locality an orthopedic procedure.

Q Doctor, with relation to this Rhizotomy, is there an actual surgery or is this done by electrical impulse?

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A It is an electrical type of procedure.

Q It is an actual surgical excision?

A No, there is no sort of opening made straight in the spine.

Q So in that sense it is not a surgical intervention, is it?

A It is considered a surgical intervention.

Q Is there an opening made?

A No, sir.

Q It is done with electrical impulse?

A That is correct.

Q Now, sir, with relation to your opinion that you rendered in this particular case in response to the hypothetical questions, did you use as a basis for your opinion that you rendered the report made by Dr. Gervin?

A No, sir.

Q Did you use as a basis for your opinion any of the reports that were handed to you?

A Well, I would say my opinion --

Q Sir, can you answer that question?

A I can't answer it on a yes or no basis.

Q Sir, did you use those opinions rendered by other doctors as a basis for your opinion?

A Only insofar -- if I may be allowed to respond --

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Q Sir, could we have an answer to that?

THE COURT: No, I will let him answer.

A -- only so far as review of such reports were helpful to me to find out what happened at the hospital, what operation was performed, what treatment was performed, what the operative findings were that were necessary.

Q Those reports, of course, were reports that were not included in the hospital records? Isn't that true?

A I don't quite understand.

Q Well, sir, these were reports made by doctors that you had copies of, did you not?

A Well, I had information from the doctors, certain reports, progress notes, plus hospital records.

Q So you used reports that were not contained in the hospital records? Isn't that true.

THE COURT: I don't know what you are driving at.

MR. SCHULTZ: Sir, he had copies of letters from doctors.

THE COURT: He said he had hospital records.

MR. SCHULTZ: But he used both. That is what I want to establish.

Q You used the letters from these various doctors, plus hospital reports?

A All the information was helpful.

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Q And you used that as a basis of your opinion? Isn't that true?

A In conjunction with what I found and what my opinion was.

Q Sir, in formulating your opinion, did you also use as a factor in this opinion the reports of the myelogram in 1975?

MR. LASSOFF: Objection. This doctor read the myelogram; he didn't read a report of a myelogram.

THE COURT: Is the question whether he read the myelogram directly?

Q Doctor, did you read the myelogram plates that you say are here?

A Yes, sir.

Q Did you use those myelograms, your interpretation of those myelogram reports as a basis for your opinion?

A Yes, sir.

Q You did?

A Yes, sir.

Q And, sir, that applied to your opinion which you rendered as a result of your examination in 1976? Isn't that true.

A Yes.

Q Sir, did your opinion that you rendered as a result

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of your examination of 1976 also rest on an interpretation of the X-rays that you took?

A Yes, partially.

Q And those X-rays were those that you took in 1976?

A Yes, sir.

Q Doctor, how many time would you say that you examined plaintiffs who were litigants in behalf of Mr. Heckerling?

MR. LASSOFF: Objection. Mr. Heckerling isn't in this lawsuit.

THE COURT: It is a different lawyer anyhow. You have exhausted that. You did that 10, 15 minutes ago. You are on something else now. We are not going to go back to it again. Next item.

MR. SCHULTZ: I have no further questions.

THE COURT: Do you have any redirect?

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Just one question. Before I saw you a week ago Monday did you know me, ever examine for me, ever have any contact with me or my office?

A Absolutely none whatsoever.

MR. LASSOFF: Thank you.

MR. SCHULTZ: At this time I would like to make a

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motion outside the presence of the jury.

THE COURT: Come up here.

(At the side bar.)

MR. SCHULTZ: I going to move to strike the opinion rendered by this doctor.

THE COURT: Denied.

MR. SCHULTZ: On the basis that he had testified that the basis of his opinion in part was predicated upon reports of other doctors and those reports are not in evidence I further establish on cross-examination that he rendered his opinion on the basis of the myelogram that was performed in 1975, and that myelogram is not in evidence.

THE COURT: I am now putting it in. You brought it out. I am now putting it in.

MR. SCHULTZ: When he rendered his opinion it was not in evidence.

THE COURT: It is now.

MR. SCHULTZ: I also move that that opinion be stricken on the basis that the X-rays upon which he based his opinion were not in evidence.

THE COURT: They are now. By your cross-examination you brought them in.

MR. SCHULTZ: If your Honor please, at this time I respectfully except to that ruling. I think that is highly

prejudicial, your Honor.

THE COURT: I don't think it is at all.

(In open court.)

MR. LASSOFF: Doctor, would you leave your X-rays, please.

At this time, your Honor, may I offer in evidence the myelogram taken at the Hollywood Hospital in 1975.

THE COURT: 9 is admitted.

MR. SCHULTZ: Objection.

THE COURT: I already ruled upon your objection at the side bar.

XXX (Plaintiff's Exhibit 9 received in evidence.)

MR. LASSOFF: I also offer in evidence the X-rays taken by Dr. Friedman in May of 1973 and January of 1976.

THE COURT: Put them in as one exhibit.

MR. LASSOFF: Yes.

XXX (Plaintiff's Exhibit 10 received in evidence.)

(Witness excused.)

MR. LASSOFF: I believe we were on the cross of Mr. Chiarello.

THE COURT: Mr. Chiarello will resume.

THOMAS J. CHIARELLO, resumed.

THE CLERK: Mr. Chiarello, you are still under oath.

CROSS EXAMINATION (Continued)

BY MR. SCHULTZ:

Q Mr. Chiarello, to get back to the actual happening of the accident, sir, you told us that there was a dip in this roadway?

A The one under the trestle, yes, sir.

MR. LASSOFF: I don't mean to interfere, but I see a witness who was asked to come here.

THE COURT: It is too bad. We want to finish with this witness.

Go ahead.

THE WITNESS: You asked about the dip, sir, underneath the trestle, yes, sir, there was.

Q Is that the only dip that you had reference to?

A Yes, it is the only dip that is there.

Q That dip is the lowest portion of the roadway, is it not?

A Of the roadway, yes, it is.

Q Now, sir, was this pool of water or puddle, was that in the dip?

A No, sir.

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Q Sir, did this occurrence, this actual impact, did that take place while your vehicle was on a slight upgrade?

A Extremely slight upgrade, yes, sir. I would say slight, yes, sir.

Q Sir, for how long a distance ahead of you was this upgrade?

THE COURT: From the point of impact?

MR. SCHULTZ: Yes, from the point of impact.

A From the point of impact it goes up to the bridge and then you continue up to the top of the bridge.

Q It is a continual upgrade?

A From point of impact you have a slight grade, then you go up even more, yes, sir, you do.

Q In other words, the contour of the road was continually upgrade from the point where you were?

A Increasing as you went up further, yes, sir.

Q And in back of you was this dip, this lower portion of the roadway?

A You have to understand, sir, behind me was level, then came the dip.

Q The point where you say it was upgrade?

A Slightly upgrade, sir.

Q And I take it, sir, that you say that this pool

or puddle was on an area at which the ground was upgrade?

A No, sir, I did not say that; that is not true.

Q Where do you say the pool was?

A It was approximately two and a half car lengths in front of me, sir -- well, no, about one and a half car lengths in front of me, in front of my car.

Q From your previous testimony that terrain was upgrade all the way up to the bridge?

THE COURT: He now twice told you that it varied, and you keep indicating to the jury with a broad sweep of your hands to give an impression to the jury contrary to the witness' testimony.

MR. SCHULTZ: I respectfully except.

Q Did you testify that there was an upgrade all the way from the point of the accident to the bridge?

A I said there was a slight upgrade where I was and that at the point of the impact of the accident there was a slight grade there, and then you asked me, "Does the area ahead of you go up toward the bridge?" It does. You didn't ask me about the point where the puddle was, the puddle ahead of me. I was waiting for you to ask me that, sir.

Q Sir, I take it now that you have heard that the

place where the puddle was was level?

A It was flat, yes, sir.

Q In other words, the roadway did not continue uphill all the way?

A No, sir. You had about the length of a car where it was slightly flat, where when the water came down it formed a ponding condition right there. I testified to that yesterday, sir.

MR. SCHULTZ: I move to strike it, your Honor.

THE COURT: Sustained.

Q Prior to this occurrence, sir, you told us that you worked as a pier superintendent on the docks? Is that true?

A Yes, sir, that is true.

Q And as part of those duties did you have to lift before this accident heavy objects?

A When it became necessary, yes, sir.

Q And, sir, did you have to slide doors of freight cars?

A When it became necessary, yes, sir.

Q What are some of the ways that you had to lift during this period of time, say seven or eight years before this occurrence?

A Some pretty heavy weights, I guess a carton of

50 or 60 pounds. How heavy is the door to roll open? Come to specifics, that would be very, very hard. That would mean I have to stop before I pick something up and read the approximate kilos and pounds.

Q Can you tell us some of the estimates of the weights you did lift prior to this occurrence?

A Maybe one pound to a hundred pounds, anywhere in there.

Q And, sir, sliding the doors, you would have to plant your feet and move the door, would you not?

A On a sliding door, yes, sir, that is the way it would be.

Q Most of those freight cars had sliding doors, did they not?

A I believe every freight car nowadays has a sliding door, yes, sir.

Q In the course of this lifting and the movement of sliding these doors did you have to strain your back or have pain in your back?

A Never, sir, never.

Q You told us that you played football at this private military academy?

A Yes, sir, I did.

Q Did you ever sustain an injury to your neck or to

your back?

A Never.

Q I assume that when you were there were you taught what is known as spearing?

A Any coach that is worth two cents that teaching spearing should not be allowed on a football field.

MR. SCHULTZ: I move to strike.

A (Continuing) Spearing is an illegitimate act, sir, hitting with your helmet. No, sir, I was never, never taught to spear, never.

Q Now, prior to this accident, sir, you had a condition known as hypertension?

A High blood pressure, yes, sir.

Q For how long prior to this accident did you have this high blood pressure condition?

A I think I found out about it about two or three years prior to the accident.

Q Sir, under whose care did you come for this hypertension?

A I'm not sure. I think I saw a Dr. Rothman at one time. I think I saw a Dr. Spitz for it. I am not sure, sir.

Q Now, sir, referring to Plaintiffs' Exhibit 8 --

THE COURT: The tax returns?

MR. SCHULTZ: Yes, sir.

Q I show you this return for 1978 --

THE COURT: 19 what?

Q 1970, I am sorry. There is a list of doctors there.

Can you tell me, sir, which of those doctors, if any, treated you?

A Dr. Rothman is one that I believe treated me. Hal of them I don't even know. Rothman is the only one I can remember.

Q Can you tell me, sir, did Dr. Rothman treat you for hypertension?

A I believe so, yes.

Q Where is his office located?

A Staten Island, right down the block from where I used to live, Richmond Avenue.

Q I show you a tax return for 1969 and there is a list of doctors there. Can you tell us, sir, which doctors, if any, treated you?

A I think these are my kids' and wife's doctors. I don't think any of these doctors treated me.

Q How much did you weigh in May of 1973?

A May? Probably about the same thing I weigh now. I think -- you're talking about May of 1973? I would

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guess around the same thing I weigh now. I weigh most the same all the time. I have a difficult time with weight.

Q Would you tell me, sir, how much did you weigh at the time of the occurrence?

A The same thing, 260.

Q What do you weigh now?

A 260.

Q Would you say that you weighed about 260 in May of 1973, too?

A It would be a guess, sir. I usually run close to the same thing since I was 18 years old, I weighed between 235 and 260. I played football at 235 pounds, sir, and I was 17 then, sir.

THE COURT: Pardon me.

How tall are you?

THE WITNESS: 6' 2-1/2", sir.

Q With relation to your present activities, sir, in and about Florida, I take it that you are licensed to drive a car in Florida?

A Yes, sir.

Q In order to obtain this license was it necessary for you to take a driving test there?

A No, sir, it was not.

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Q You used your New York State driver's license?

A Yes, sir, it is transferable with a written test.

Q In Florida you do drive a car?

A Yes, sir, once in a while when it is absolutely necessary.

Q How many times a week would you say you drive a car?

A Right now? Maybe once a week, maybe twice a week.

Q Sir, I take it that this house that you live in has a swimming pool?

A Yes, sir, it does.

Q Do you swim in this swimming pool?

A Almost every day, every chance I get in there, I do as much as I possibly can.

Q For the year 1974, the summer of 1974, did you and your family take any vacation at all?

THE COURT: That is before he moved to Florida?

A I was there. I don't believe so, sir.

Q How about this past summer?

A No.

Q Did you go any place, take any trips?

A No. My son was there in the midst of his

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baseball and it was much too important to him to get away. We don't go away unless we all go.

Q Sir, in the summer of 1973 of course you were here until August?

A Till of August, yes, sir.

Q Now, you went to see Dr. Gervin some time in July of 1975, isn't that true?

A No. Wait a minute now? You are in '75.

Q July of '75?

A I had been seeing Dr. Gervin since August of '73, sir, so I very well could have in July, yes. As a matter of fact, I think that is about the time he sent me for the tomogram, sir.

Q Dr. Gervin is your treating doctor down there?

A No, he is neurosurgeon and Dr. Leone is my primary.

Q Your treating doctors are Dr. Leone and Dr. Gervin?

A Yes, they are.

Q Dr. Friedman examined you on two occasions?

A Yes, sir, he did.

Q You were sent there by the lawyers?

A Yes, sir, both times.

Q Could you tell us where Dr. Leone's office is?

msll Chiarello - cross

A Yes, sir, it is on Hallandale Beach Boulevard. Would you like the .act address?

Q That is in Hallandale?

A Yes, sir.

Q And Dr. Gervin is where?

A He is in Hollywood, sir, on Hollywood Boulevard.

Q And you live in Coral Springs?

A Yes, sir, I do.

Q How often do you go to see Dr. Leone?

A Quite often, sir, maybe at least once a week; most of the time it is once a week.

Q How do you get there?

A With my wife.

Q Do you drive?

A Have I ever driven to Leone's office? Not that I can remember. That is a fairly long distance; that is about 45 minutes.

Q Have you driven there, sir?

A No, sir.

Q How about Dr. Gervin, do you drive to his office?

A Maybe once or twice I have driven to Dr. Gervin's office. I might have driven to his office.

Q Now, sir, when you go swimming in the pool, do you swim back and forth the entire length of the pool?

A No.

Q What do you do, sir?

A Float around as much as possible. The pool comes down and then dips off halfway. I like to stay in the area where my toes can just about touch, because it takes away completely the weight of your body and removes the pressure on you. It is very, very nice.

Q Do you swim, sir, in the pool?

A No.

Q Do you exercise at all in the pool?

A No, sir, I don't.

Q How many packs of cigarettes do you smoke a day?

A Right now about two.

Q Are you presently on medication for high blood pressure or hypertension?

A Am I right now? No.

Q When were you last treated by Dr. Leone?

A I believe it was about three weeks before I came down, because I came to New York.

Q When did you come to New York?

A The 1st of January.

Q New Year's Day?

A Yes, I left Florida New Year's Day.

ms13 Chiarello - cross

Q I assume you flew?

A No, I took a train. I would have rather flwon. The train ride was extremely hard.

Q You went by train?

A I had to. That is the only way I could get to Florida. There was no other way to get out of Florida.

Q You came up by train?

A I had to, yes, sir.

MR. SCHULTZ: I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q When you bought the house you are living in was there a swimming pool?

A No, I bought a vacant lot, sir.

Q Did you receive a prescription from a doctor for a swimming pool?

A Yes, sir.

THE COURT: Prescription for a swimming pool?

MR. SCHULTZ: Objection.

$HE COURT: Sustained.

Q Did you receive any advice from Dr. Gervin with respect to physical activities?

ms14 Chiarello - redirect

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, sir. He advised me to do as much swimming as I possibly could and floating. By swimming, he meant floating in the water and getting enough water exercise, as much as possible. He advised against the ocean because of the breakers.

Q Now, I think on cross-examination yesterday you testified that you joined American Stevedores as a working stevedore after you got out of the Service?

A Yes.

Q Can you tell us what branch of the Service you were in?

A The Air Force.

Q How long were you in the Air Force?

A Four years.

Q What was your job in the Air Force?

A I was a basic training instructor in Lakeland Air Force Base for four years, then an on the job training instructor in Lycoming engines at Laredo Air Force Base for the final two years of Service.

Q Did you volunteer to join the Air Force?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

ms15 Chiarello - redirect

Q Did you pass the physical examination to enter the Air Force?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Did you at any time sustain any injury while in the Air Force?

A Never, sir.

Q Now, getting back to the place of the accident, this dip underneath the railroad trestle, when you went through that with your car was any more water there than any other part of the road you traversed?

A No.

Q Can you tell us why?

A It has got excellent drainage under there. There never is.

MR. LASSOFF: No further questions.

THE COURT: You may step down.

(Witness excused.)

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MR. LASSOFF: May I have just two minutes. The witness just walked in.

THE COURT: Put him on. We are here to try a case.

J O S E P H A. C H I A R E L L O, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

THE COURT: Isn't there an "i" after "iar"?

THE WITNESS: C-h-i-a-r-e-l-l-o.

THE COURT: You don't spell it the same as the plaintiff?

MR. LASSOFF: I think it is the same spelling.

THE COURT: The summons and complaint spells it C-h-i-a-r-i-e-l-l-o, and that is the way the plaintiff spelled his n when he took the stand.

MR. LASSOFF: I didn't prepare the summons and complaint.

THE COURT: But you put the witness on the stand?

MR. LASSOFF: Yes.

THE COURT: You don't spell it the same as the plaintiff?

THE WITNESS: Yes, I do, but his is spelled wrong, let us put it that way.

DIRECT EXAMINATION

BY MR. LASSOFF:

Q You are quite obviously related to Thomas Chiarello?

A Yes.

Q Tell us the relationship?

A He is my nephew.

Q By whom are you employed at the present time?

A Universal Maritime Service Corporation.

Q Is that the successor corporation to Universal Terminal Stevedoring?

A Yes.

Q Was that name changed about two years ago?

A I believe so, yes.

Q What is your job with Universal?

A I am a superintendent in charge at the Bush Terminal Piers.

Q How often or with what regularity do superintendents get paid at Universal?

A Bi-weekly.

Q Can you tell us what your bi-weekly pay was in January, 1972?

MR. SCHULTZ: Objection, your Honor.

THE COURT: On what basis? Do you want to come up

to the side bar?

(At the side bar.)

MR. SCHULTZ: There is no relevance, what he gets paid. He is not a litigant.

MR. LASSOFF: He is a superintendent, doing the same work.

THE COURT: He has the same work, the same scope of activities? How are you going to prove that? There is no union contract which has built-in increases.

MR. LASSOFF: There are no built-in increases.

THE COURT: How are you going to prove that this man's salary and the plaintiff's salary would always be the same?

MR. LASSOFF: I want to show the periodic increases.

THE COURT: You got to have somebody from the company to show that it was the company's policy to give the increases. I sustain the objection.

(In open court.)

Q Mr. Chiarello, at the time of this accident to Thomas Chiarello, at the time he was employed as a terminal superintendent, will you tell us thetype of work that a terminal superintendent does for Universal?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q What is your job with Universal?

MR. SCHULTZ: Objection. I don't see any relevance

THE COURT: Overruled.

A I am a terminal superintendent.

THE COURT: This terminal is in Brooklyn?

THE WITNESS: At Bush Terminal.

THE COURT: The plaintiff was a superintendent at the Port in Newark, and then at an army installation in Bayonne.

MR. LASSOFF: Before that he said he had been at Brooklyn.

THE COURT: We are talking about the period immediately preceding.

Q Is the work of a terminal superintendent at Bayonne Terminal and the Meyer Line Pier at Port Newark the same as the work you do at the Bush Docks?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Is the work of a terminal superintendent at Universal the same at every pier?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Have you ever been to the Bayonne Military Ocean Terminal?

A Yes, sir.

Q Have you ever worked at Bayonne?

A Yes, sir.

Q Have you ever worked as a terminal superintendent at Bayonne?

A Yes.

Q Will you tell us what the work of a superintendent is at Bayonne.

MR. SCHULTZ: Objection.

THE COURT: He qualified him. It took a long time to get the message, but he did.

Q What is the work there?

A Well, it is a wide and varied job. First of all, there is paper work involved, ordering men, ordering gangs, having the knowledge what gangs and what men to order, which is done at a certain hour of the day. The balance of the time is spent -- Bayonne is a vast terminal and is a lot of walking up and down the ships, vessels, responsibilities; there is what we call conventional vessels, where you load and discharge with the ship's gear and boom, and what we call unconventional vessels, where you walk up the platform, where draft cargo is driven on or driven off, but it is my duty, or the duty of any superintendent to physically go up and down whatever vessels, whatever ships are working, go in the

hatches, climb up and down the ladders to inspect. If it is necessary and when it is necessary, to see if there are any problems or no problems, to see where the men are at so you can judge your next day's work and whatnot.

Then what we do on vessels, we go see the captain, or the chief officer or the chief mate to go over a plan or to go over the workings of the vessels. And then we have also in the terminal, because that is why they are called terminals, you receive and deliver freight for each vessel. In other words, when I say receive, it will come in by truck. We work on loading and discharging trucks, loading and discharging lighters and rail cars, and you have to go aboard the trucks or rail cars and lighters, whatever the case. That is what we call a part of the terminal work.

And we see that the men are doing their job, that they start their jobs right. We have to know what is there for a particular ship and what is not. And the reverse is the same. The cargo comes off a vessel and must be delivered to whatever destination it is for. In the case of Bayonne, they go to the government destinations, and we are responsible for loading these various inland conveyances and the rail cars or the lighters and the containers, which is the new mode of conception.

Basically, those are some of the duties, plus

getting bawled out if things don't go right.

Q Could you tell us approximately how much of your job deals with clerical duties, paper work, and how much would the physical activities?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled. I assume he means at the Bayonne Terminal?

MR. LASSOFF: Yes.

A The clerical work or so-called paper work in the terminal is minor compared to the actual physical work that must be done, and it is the usual practice that we get there prior to the work starting. We are there 6:30, 7 o'clock in the morning, setting up the paper work details, and if the job finishes, say, 5 or 6 o'clock, whatever the case may be, we stay an hour or half hour whatever time you need to do whatever work you have, to make out reports, so to speak.

Q With regard to the physical activity on the pier as a terminal superintendent do you have to do any heavy work at Bayonne?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A There is always physical work for anyone to do, no matter what, even if you have somebody that is doing the job, you end up 80 percent or 90 percent of the time doing

the job yourself. If you see cargo on the floor, you might get a rail car or a trucker, or where the cargo has shifted, you try to get the cargo back, to see that it does not fall. We are also responsible for the safety of the individuals, which has gotten to be a very important segment of our industry. So we try to make sure everything is right prior to letting a man do something that is not right.

Q Mr. Chiarello, you have been in court with me before, have you not?

A Yes, sir.

Q Always on the other side of the fence?

A A hundred percent.

Q This is the first time that I have ever used you as a witness?

A Yes.

Q The other times you have come in and testified on behalf of your employer?

A Yes.

MR. LASSOFF: You may inquire.

MR. SCHULTZ: No questions.

THE COURT: You may step down.

(Witness excused.)

ANGELA CHIARELLO, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

THE COURT: We will correct the court's records as to the spelling of the name.

THE WITNESS: That is the correct spelling.

DIRECT EXAMINATION

BY MR. LISSOFF;

Q Mrs. Chiarello, are you married to Thomas Chiarello and do you reside with him in Florida?

A I do.

Q Can you tell us when you were married?

A June 11, 1961.

Q Where were you married?

A Holy Ghost Church in Brooklyn, New York.

Q In June of 1972 how many children did you have?

A Three.

Q Will you tell us their sex and ages, please.

A The youngest one is five, female --

Q We are talking as of 1972, Mrs. Chiarello.

A Yes, my son was 9 and my daughter 10.

Q Can you tell me what your relationship was between your husband and yourself prior to this accident?

A We had a very good relationship. We had a good

marriage.

Q How about the relationship between your husband and children?

A That was very good also.

Q After this accident did you relationship change in any way?

A Yes, sir.

Q Will you tell us about it?

A He became harder and harder to live with. The children would come home from school and try to tell him about their day and he would just stare straight ahead and not even acknowledge them. The only time he would say anything to me was to start an argument. And he was extremely depressed, especially when he realized that he was impotent. It seemed to bother him tremendously.

Then my father and I, my father-in-law and I finally convinced him to go for surgery, because he was petrified.

Q When for the first time did you discover that your husband was impotent?

A The exact date?

Q Approximately?

A After the accident.

Q What?

A After the accident.

Q How long approximately?

A Well, the first time we tried after the accident.

Q Prior to this accident can you tell us how often you and your husband had sexual relations?

A Sometimes three times a week, sometimes two times a week, sometimes four.

Q Did you know or did you hear your husband at any time prior to this accident ever complaining about his back or his neck or his arm or any part of his body?

A No,sir.

Q Prior to this accident what, if anything, did your husband do around the house?

A He mowed the lawn, he did the painting, if something had to be fixed, he repaired it, he took the children to various sports they were involved in; he coached my son's baseball team; he helped out with football.

Q When did you notice a substantial change in his personality, if you ever did?

MR. SCHULTZ: Objection.

THE COURT: I don't know of any claim of change in personality.

Q When did you notice a deterioration in your relationship?

A After the accident.

Q Can you give me a time and a progression, if there was such a progression?

A Well, my father-in-law finally insisted that he have the surgery done because he was very depressed, and after the surgery he started to improve, you know, he was a little better. Then when the pain began getting worse, he started talking about killing himself. He had me call the doctor and asked the doctor to cut off his leg; he asked me to cut off his leg. After that, they gave him a machine to wear for his back, and he slightly improved after that. Then the machine started to burn his back and the pain started coming back, and he just didn't want anybody around.

He would just stare and would not talk to anyone. Then after that he went into the Rhizotomy, and that didn't help at all. So he didn't want the children around; he was yelling; he would not allow them around; he kept chasing them around the house; he didn't want the friends in the house, and we went for days and days without him saying a word to me. He just didn't want to talk; he just didn't want anybody around. I could not cook right; I could not clean right. I just could not take it any more. So I decided I would call in a lawyer and I made an appointment --

MR. SCHULTZ: I move to strike it.

THE COURT: I will strike it.

Q Did you ever contemplate the thought of divorce?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Has this impotency on the part of your husband continued from the first time you noticed it until the present day?

A Yes, sir.

Q How does that affect you?

A I don't understand the question.

THE COURT: I assume you are examining the witness on the loss of consortium?

MR. LASSOFF: Yes.

THE COURT: Be specific.

Q How does the fact that your husband is impotent affect you?

A Well, he can't satisfy me sexually. Is that what --

Q I don't know. You have to tell me. He can't satisfy you sexually? How does that affect you? What does it do to you?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

Does it make any difference to you?

THE WITNESS: No, sir -- I mean, I accepted it,

but he hasn't --

THE COURT: That is not what we are asking you. It doesn't make any difference to her. She has accepted it.

Q Where did you meet your husband?

A I worked for American Stevedores, where he was employed.

Q And since youhave been married have you ever worked before this accident?

A No, sir.

Q Did you go to work after this accident?

A Yes.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q When medication was prescribed by these various doctors for your husband, who got the medication?

A I did.

Q Who kept the medication?

A I did.

Q Why?

MR. SCHULTZ: Objection,

THE COURT: Objection overruled.

Q Why did you keep the medication?

A Because he said many times that he wanted to kill

himself.

MR. SCHULTZ: I move to strike it.

THE COURT: Overruled.

Q Now, when you say that you have accepted the fact that your husband is impotent and it doesn't bother you, is there anything about your husband's present condition that bothers you?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained. That is not the loss of consortium.

Q As a result of this injury have you had to do any work at home that you did not do before this accident?

A Yes.

Q What work is that?

A I have had to take care of the laundry, to do the painting, take the children wherever they had to go for their sports and activities, wash down the patio, the garage, take care of the trash.

Q Did you have to go to work?

A Yes.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Have any of your husband's activities in and around the house affected you or your children in any marked degree,

and if there is such an instance, will you tell us about it.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Before this accident did you and your husband enjoy a social life with other people?

A Yes, sir.

Q Since this accident what does your social life consist of?

MR. SCHULTZ: Objection.

THE COURT: Overruled. This would be embraced in the loss of consortium.

A The extent of my social life is now going to watch my son play baseball and football period. That is it.

Q In connection with your son's playing baseball and football in Florida, do you have to devote a certain amount of your time in Florida?

A Not in Florida; this was in Staten Island.

Q How did your husband get to Dr. Spitz, to Dr. Urs, and to Dr. Leone and to Dr. Gervin?

A I took him.

Q Has your husband ever gone to a doctor or a hospital by himself?

A Maybe on one occasion or two occasions, when I was some place with the children, only if it was absolutely

necessary. If I could not take him, my father-in-law would take him or my father would take him.

Q Incidentally, what is your date of birth, Mrs. Chiarello?

A June 10, 1942.

Q So that you are a 33?

A Yes.

Q While you and your children have been in the house have you seen your husband do or commit any unusual acts?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Have you seen your husband physically try to damage himself?

MR. SCHULTZ: Objection.

THE COURT: Sustained. That is not an item of damage in this case.

MR. LASSOFF: It may be an item of damage in Mr. Chiarello's case.

THE COURT: No, it is not.

Q Do you have any degree of companionship with your husband at the present time?

MR. SCHULTZ: Objection, your Honor.

MR. LASSOFF: By that I meant light conversation, the ordinary small talk that goes with every marriage.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A No, sir, he very rarely talks to me.

Q Does he talk to anybody?

A No.

Q Does he talk to your children?

A No, he tells them to brush their teeth occasionally

Q How does he get along with the children?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Is he involved with the children's activities in any way at the present time?

A He comes to watch, he does watch them.

MR. LASSOFF: No further questions.

MR. SCHULTZ: No questions.

THE COURT: You may step down. Thank you.

(Witness excused.)

THE COURT: Next witness.

MR. LASSOFF: The next witness I have, your Honor, is Dr. Kaplan.

THE COURT: Do you have any other witnesses?

MR. LASSOFF: I can read a deposition of the defendant.

THE COURT: Read it now.

MR. LASSOFF: I offer this deposition of Mr. Henry Girwood, one of the defendants in this action. May I mark this for identification.

XXX (Plaintiff's Exhibit 11 marked for identification.)

MR. SCHULTZ: If your Honor please, at this time I would like to object on the basis, sir, that this deposition was returned by a letter dated January 5, 1976, and I did not get it until, I think, a couple of days after that. The defendant, Mr. Girwood has not had an opportunity to look at it.

THE COURT: Is it signed?

MR. SCHULTZ: No, sir.

THE COURT: What have you been doing for two years? It is your job to have the case prepared for trial.

MR. LASSOFF: They have had the deposition, your Honor.

THE COURT: You knew the trial date was fixed in December.

MR. LASSOFF: I asked to have it returned to me.

MR. SCHULTZ: We got this by a letter dated January 5, 1976.

THE COURT: Is that when you first submitted it for signature?

MR. LASSOFF: Yes.

THE COURT: What is the date of the deposition?

MR. LASSOFF: The date of the deposition is April 11, 1974.

THE COURT: Nothing doing.

MR. SCHULTZ: Mr. Gerwood is supposed to be in my office today. I would have him review it and look at it, so he can use it at that point. But at this point I want to object, because Gerwood has not seen it.

THE COURT: I sustained you. Why do you keep talking. You are ahead of the game. You are supposed to quit.

We better go to lunch. 2 o'clock.

(Luncheon recess taken.)

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AFTERNOON SESSION

2 o'clock P. M.

(Jury in box.)

MR. SCHULTZ: Your Honor, I omitted to ask Mrs. Chiarello one or two questions. May we have her recalled?

THE COURT: Yes.

A N G E L A C H I A R E L L O, resumes.

THE COURT: Go ahead, Mr. Schultz.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q Mrs. Chiarello, on direct examination you stated that your husband was impotent? Is that correct?

A Yes, sir.

Q Mrs. Chiarello, since this accident up until the present time have you had sexual relationships with your husband?

A We tried.

Q Have you had sexual relationship with your husband, Mrs. Chiarello?

A You mean the whole act completed?

Q All right. Mrs. Chiarello, do you recall that in March or in April of 1974 you testified?

A Yes, sir.

Q I refer you to page 60 --

MR. SCHULTZ: If your Honor please, I don't have a copy for you. This is the only copy I have.

Q Page 65, line 14, do you remember these questions and answers, Mrs. Chiarello, line 11:

"Q Have you had relations with your husband since the accident?

"A Occasionally.

"Q Mrs. Chiarello, you mention you have had relations with your husband sometimes. Approximately how often do you have sexual relations with him now?

"A Maybe once every two weeks; once a month."

Do you recall those questions and answers?

A Yes, sir.

Q Now you told us back in April of 1974 that you had relations with your husband sometimes once every two weeks or once a month. Has that continued up until the present time or has it increased?

A I am sorry. Would you repeat that.

Q You told us that up until April of 1974, following the accident, you had sexual relationship with your husband on an occasion of once every two weeks or once a month. I would like to know now, is that the same or do you have sexual relations more often now or what?

A No, the last time that we had that, that we tried

was three months ago.

Q And before that? Do you have any estimate as to the number of times? A week or month that you had sexual relations with your husband?

A It became less and less; more and more time in between.

Q Mrs. Chiarello, I would like for you give me an answer as to how many times a week or a month you have had relations with your husband?

THE COURT: Now?

MR. SCHULTZ: Within the past six months or a year.

THE COURT: She says the last time was four months ago. I don't know how more definite you want than that.

Q Before the last time, which you say was four months ago, could you tell us the frequency?

A Maybe three months before that. I can't say, because it really isn't that often.

MR. SCHULTZ: Thank you, Mrs. Chiarello.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Mrs. Chiarello, we are talking about sexual relations with your husband. Since this accident has your husband ever had an organism to your knowledge?

A No, sir.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

MR. LASSOFF: Thank you.

THE COURT: You may step down.

(Witness excused.)

MR. LASSOFF: May I call Dr. Kaplan, your Honor.

D R. L A W R E N C E K A P L A N, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Dr. Kaplan, are you a physician duly licensed to practice medicine in the State of New York?

A Yes, sir, I am.

Q You maintain an office for the practice of your profession?

A I do.

Q Where is that office located?

A My office is at 812 Park Avenue, New York City.

Q Would you tell the court and jury your professional training, education and hospital connections and specialties, if any?

MR. SCHULTZ: I will concede Dr. Kaplan's qualifications.

THE COURT: As what?

MR. SCHULTZ: As a neurologist and psychiatrist.

MR. LASSOFF: I think it is important, since we are going to have adverse testimony.

THE COURT: In view of his fighting on the other one, I will take his concession on this one.

MR. LASSOFF: I prefer the jury to know.

THE COURT: I don't think we have to waste any time. Let us move along. You have a concession. You take it.

What is your specialty, Doctor?

THE WITNESS: Neurology and psychiatry.

Q Is your practice limited to that specialty?

A Yes, it is.

Q At my request on January 6, 1976, did you examine Mr. Chiarello?

A Yes, I did.

Q During the course of that examination were you furnished with hospital records, doctors' reports and myelograms?

A Yes.

Q Will you tell us what your examination consisted of.

A Yes, my examination consisted of obtaining a history from the patient and from the medical records, reviewing the medical records, finding out the patient's present situation in terms of his complaints and symptoms, and conducting a neurological or neuro-psychiatric examination in terms of developing his present neurological status, and, of course, his psychiatric status from his history.

Q Did you obtain such a history?

A Yes, sir.

Q What was that history?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A The history briefly was that he was injured in June, on June 30, 1972, while he was driving a car, and following this injury he had a number of complaints, including head complaints, neck complaints, as well as leg pain, and was under treatment with various physicians and hospitals for this injury and its residual effects.

He received various treatments at the Richmond Memorial Hospital, at the St. Vincent's Hospital; he was in traction for several months, and in spite of all the treatment he continued to have increasing pain, particularly pain in the back and right lower extremity, but also pain in the neck, involving the upper limbs and some head complaints.

He was ultimately, in December of 1973, which was a year and a half approximately after this injury, admitted to a hospital in Florida, at which time he underwent an operative procedure on his back, which is called a laminectomy in which the covering of the spinal canal is removed and an operation is performed which removes disc material pressing on nerve roots, and ultimately he also continued under both orthopedic and neuro-surgical care, was treated by a neurosurgeon in the Florida area, and has been seen by a number of other physicians, including a psychiatrist because of his residual complaints.

At the time of this accident, I was told, in 1972, he was working regularly as a stevedore superintendent and had been at this job for some five years and that he had been unable to return to work since this accident because of his complaints.

I reviewed a number of medical reports, and I don't know if it is necessary to repeat them all. I think I might abstract some of the pertinent information from them.

Q Before you do that, will you tell the jury what the field of neurology is in medicine?

A Yes, it is the study and treatment of disorders of the nervous system. The nervous system is made up of the brain, the spinal cord and all the nerve structures which

emanate from the central organs to supply the head, trunk and limbs. These are called nerves and nerve roots. And neurology is the study and treatment of any portion of the nervous system.

Q Are you a diplomat both in neurology and psychiatry.

A Yes, sir.

Q In addition to practicing medicine, are you also a teacher of neurology?

A Yes, I am.

MR. SCHULTZ: I object.

THE COURT: We have been through this.

Q Would you abstract what you did?

A I reviewed reports by a number of physicians who had seen him during the period of time that he was under treatment, including reports of myelography, orthopedic evaluations, reports from Dr. Friedman, who had seen him from the orthopedic viewpoint on more than one occasion, and I reviewed a number of hospital records.

I think I might first go to the hospital records first, in Virginia, at the Richmond Memorial Hospital in January of 1973, the patient had complaints which were attributed to his automobile accident and he had findings on examination of difficulties with the right hand, with weakness, and while in the hospital he underwent a myelogram,

which is a neuro-diagnostic test, in which a spinal test is done, that is, a needle is placed in the low back region, in the lumbar region of the spinal canal, some spinal fluid is removed, and a radio opaque dye, which is called pantopaque, is injected, and then the patient is rotated on a fluoroscopic table, and the column of dye, which is radio-opaque and is demonstrated by the same densities as bone on the X-ray film, is moved up and down the spinal canal, because the spinal canal is filled with fluid and this moves, and this myelogram revealed a defect or a compression, an indentation, so to speak, of the normal column at the level of the 4th to 5th lumbar vertebrae, which is in the low back region.

He had some narrowing of the column of pantopaque in this area. Following this he was treated with conservative orthopedic and physical therapy.

At the time of his admission to the Richmond Memorial Hospital a number of diagnoses were made, including the following; He was described as having a cervical sprain with cervical radiculitis, which is a sprain of the neck muscles and bony structures, with irritation of nerve roots -- that is described as a radiculitis. A nerve root is often called a nerve radical.

In addition, he was described as having a partial

lumbar disc herniation, which is a protrusion of material from the space between the vertebral bodies at the level which was described in the myelogram, between the 4 and 5 vertebral bodies.

Briefly, the spinal canal is made up of a number of vertebral bodies which are separated from each other by cushions, which are called the vertebral discs, and these are made up in two parts, a central part, which is gelatinous and compressable, and a part which is fibrous material and holds the gelatinous or neucleus pulposis material within that disc space. In a disc herniation there is a disturbance of the fibrous membrane and, therefore, the gelatinous material extrudes or protrudes from the disc space and extends beyond the borders of the canal through which the nerves are exiting. Each level is made up of this disc space. One will have pain in the distribution, pain or other findings in the distribution of a nerve root at that level. The protrusion of a disc, the exclusion of a disc, the herniation of a disc, the rupture of a disc are very often used synonymously by physicians and neurosurgeons, neurologists and orthopedics.

In addition, he was described as having hypertension of the essential type, that is, of noknown cause, and obesity.

The major diagnosis, of course, related to this injury, the cervical injury and the lumbar or low back injury with a disc herniation.

There was also a copy of the Golden Isles Hospital in Florida, for his admission in December of 1973. That also noted the final diagnosis of a herniated neucleus pulposis, referring to a herniation of the central cartilaginous material at the level of L-4 to 5, and also at the epidura adhesions.

At the dural adhesions referred to the scar tissue which is in the space outside of the membrane which contains the spinal nerve roots at that level. That membrane is called the dura, and between the dura or membrane and the bony canal which encases all of this material there is the epidural base. The nerve roots which exit from the canal outside the column to supply the limbs have to pass through the epidural space,and this space was described as having adhesions or scar tissue. This diagnosis was arrived at because he underwent an operative procedure, and the operative procedure which he underwent was on December 5, 1973.

At that time he had a hemi-laminotomy, which is an operation on the back in which protects the back of the spinal canal in which the nerve roots are running is removed, and it is removed on one side, and, therefore, it is called

hemi-laminotomy, and in doing this there was found to be on examination of the tissue in the spinal canal marked epidural scarring, which was referred to in the diagnosis, marked epidural venous engorgment, and the L4 nerve on the right was identified, was scarred and mobilized. A disc excision was then performed, and following a good decompression, the epidural space was carefully explored to assure that there was no free fragments of disc, and a foraminotomy was performed at the L4 - 5 level, which means that the opening through which the nerve root passes, which is called the foramen. That was widened by chipping away bone and connective tissue around it to increase the size of the hole through which the nerve root is passing. It was noted in this operation that the nerve root at this level, which is essentially the 5th lumbar vertebrae nerve root was marked adherent with scar tissue, that is, meaning it is hard to distinguish between nerve and scar tissue, and was frayed, which meant that it was not in one solid nerve piece, but was separated in fragments by the scar tissue.

Essentially, that was the procedure which was performed in the Golden Isles Hospital.

Following this procedure, he still had, in spite of the operation, severe right lower extremity pain at the time of his discharge, although he was ambulating or walking

with the aid of a walker, and he was supposed to have continued on conservative treatment, both bed rest and other treatments as an outpatient.

I also reviewed a copy of the Memorial Hospital record, I believe this is also in Florida, in October of 1974, at which time the patient was admitted for a facet Rhizotomy. A Rhizotomy is the cutting of the nerve root. This was not done by surgical transection, but by radio frequency; it is an electrical kind of transection of nerve or interference with nerve impulse. This is an operation which is performed for intractable pain, where pain following another operation designed to relieve it does not relieve. Then one sometimes has to perform an operation in which the impulse into the nerve is terminated and cannot reach the extremity, and in this case a Rhizotomy was performed at this level.

17 If immediately after the Rhizotomy he is pain free, that is the test of whether the Rhizotomy is done at the correct level. Following the Rhizotomy, the radio-frequency control he is free of pain, then the assumption is that the proper nerve root has been treated.

The final diagnosis in this hospital was chronic low back and right leg pain, and there was an operative report describing the Rhizotomy in technical detail.

Basically, the patient had problems in three areas of his body as a result of the accident. He had head complaints, and at one time a diagnosis of an occipital nerve involvement was made, a nerve in the back of the head. He has had significant neck complaints, and a diagnosis of nerve root irritation in the neck region was made. And then ultimately, of course, he had the myelogram and the operations for a disc herniation in the low back region with extensive scarring, and this persisted, requiring a Rhizotomy.

Now, I reviewed also all of the medical reports which were available, particularly those of Dr. Gervin, who was the neurosurgeon, who treated this patient and who performed the laminectomy and the Rhizotomy, and these indicated that because of the --

MR. SCHULTZ: Objection, your Honor, as to what Dr. Gervin's report indicates. Dr. Gervin is not going to be here.

MR. LASSOFF: I believe the reports are contained in the hospital records.

THE COURT: Are they in the records.

THE WITNESS: Yes, they are in the hospital record.

MR. SCHULTZ: If they are in the hospital record, I withdraw the objection.

THE COURT: They are reports that are attached to

the hospital records.

THE COURT: That is the one you were using yesterday in cross-examination of the witness. I will let it in.

THE WITNESS: Because of the patient's continual complaints, mainly, his major problem has been his back and his right lower extremity, because in spite of the Rhizotomy he continued to have severe discomfort, he had a number of other methods of treatment utilized, including a trans-cutaneous nerve stimulator, which is a device which is attached to the skin and which actually sends electrical impulses to the nervous system, acting, I would say, very much like an acupuncture. And because he still had significant complaints, he was re-admitted for a myelogram, which was done in June of 1975, that is, just six months ago, approximately. At the time the myelogram was reported to show a persistent defect in the column at the same level that the operation took place, at the level of L4-5 on the right side -- probably on both sides. The column was narrowed at that level with evidence also in the myelogram of scarring, which had been described at the time of the operation. I have seen these myelograms. I did not see the original one, but I have seen the myelograms taken in June of 1975.

MR. LASSOFF: May we use the shadowbox, your Honor.

Q Prior to your taking the stand today, did you go

through the various myelograms involved and did you select the ones that you thought might show the myelogram defects to the jury?

A Yes, sir. There are many X-rays, and both X-rays with the pantopaque or dye in place, and also those in which the dye has been removed. The only ones which are significant are the ones that show the abnormality which we described.

Q Would you show this to the jury and explain what it means to you as a neurologist.

A This is a film of the lumbo-sacral spine. This is the lumbo-sacral spine with the lumbar vertebrae. This is called an A-P view, which means that the plate is behind the patient and the X-ray tube in front.

These are the pelvic crests or iliac bones; this is the sacrum between the two pelvic bones, and this is the fifth lumbar vertebra. We count up from the sacrum, the fifth, the fourth, the third and the second.

And as you can see, the needle for putting in this dye which shows up even deeper than the bone -- that is the purpose for it being used -- the needle is placed between the second and third vertebrae high above the level of the lesion, so that the placement of the needle would not interfere with the level where the interest lies in terms of the pathology or abnormality.

Then a fairly large amount of pantopaque was injected. There is no way of knowing how much from this film alone, but I would estimate between 9 and 12 cc., which is almost a tablespoon full of this dye. And you can see, the column is symmetrical. This is the first sacral nerve root level, which is fairly well filled on both sides; there is a suggestion that the left one is cut off a little bit, compared with the right. This may be due to a small disc protrusion to this side. It is not very marked and it might be passed off. The major defect is at the level of the 4th to 5th lumbar vertebrae.

On the left side the column is fairly dense and goes up the side fairly straight. On the right side it is indented and there are just some signs of pantopaque, which you can see.

Instead of filling it symmetrically, as it did here, it is pushed over to one side and only fills the left side, and this is the area where the disc protrusion is described pressing on the column of pantopaque.

Now, because this patient was operated on and because the myelogram shows these stringy bits of pantopaque indicating scar tissue, it is not definite that this is a disc protrusion, because the defect could conceivably be produced by the scar tissue alone.

Above this level it becomes fairly symmetrical again, a little less in the middle where there is some scar tissue which can be seen in a better film.

This is a lateral film. This is taken from the side of the patient, and the vertebrae are now in relief from the side, and one can see the sacrum, the sacral bone. There is the back of the patient. There is the abdomen of the patient in front. This is the 5th lumbar vertebra, and this is the 4th and this is the 3rd, and you can see that this is the disc space, the part that does not show up as a density. The disc is made up of cartilage and doesn't show up as being radio-opaque on X-ray film, and at the 5th lumbar-1st sacral level, the column appears at the edge of the vertebral line, and the disc space shows fairly well, so that there is no push out of the disc material into the canal. The canal is the width of this column. In this canal all the nerve roots travel and exit at each level.

The next level, which is the 4th to 5th lumbar vertebrae, there is a defect, and you can see the column is beginning to ride backwards here. There is some of the dye coming forward into the space, and either this is a disc protrusion which is pushing out into this area, or possibly scar tissue, which is lumping up and preventing the dye from filling that area.

There also seems to be a scar tissue. It is a line which breaks the column, and there may be some stringy scar tissue up here.

On this side -- this is again an A-P film or myelogram -- it does not show the area lower down at this level -- it goes higher up to the 12th dorsal vertebra, and it shows you the spaces up here are normal.

This is the second and third lumbar vertebrae, where the needle was placed, and even that space is normal. And between the third and fourth it is fairly normal, perhaps a little indented, and the fourth and fifth you can't see on this film, which is the pathology here. This is taken lower down, and again the needle is at the second to third space. The sacral space is pretty good, except the cutting off of this nerve root on this side. There may be a small disc on the left-hand side.

The patient to have this film done is gradually tilted. First, it is done in the sitting up position approximately, so all the dye accumulates down, and then the table is rotated so that he is gradually put head down, and the table is moved again, and you can see here the dye broken into strings, undoubtedly from the scar tissue which we described at operation. I think that describes basically the pathology, which is a disc protrusion and/or scarring at the

4th to 5th lumbar vertebral level, probably both sides, because there is stringy material on both sides, more on the right, and a little defect at the L5 to the S-1 level, which may not be significant.

Q What does that myelogram mean to you as a neurologist, Doctor?

A Well, the myelogram means that this patient has problems in this area at the L-4-5 vertebral level with involvement of nerve roots at that level, primarily the right side, and the involvement may be a new disc herniation through the old. If not all the disc was removed -- and there is no way of knowing that at the time of the original operation -- so that he has a secondary protrusion, so-called, post-operative protrusion of the disc, or all of the problem may be the result of the scar tissue which was found at the first operation, and, of course, which can increase following operative intervention in the area.

Not having seen the original myelogram, I can't tell you how much more this scar tissue looks on this myelogram than it might have initially, but it would be either a disc protrusion, which is a new one, secondary to the old one at the same level in the area of the weakened disc space, or scar tissue, or both.

Q Doctor, when you have scar tissue or epidural

adhesions following an accident, does that have any great significance to you as a neurologist?

A Oh, yes, the presence of scar tissue is productive of pain. That is well known. It is also significant in that it is not easily removed, and most neurosurgeons would not accept the risk of attempting to remove adhesions or scar tissue in this area for two reasons.

One, it is not always successful. The more you remove, then the more postoperative scarring there may be. So it is a sort of vicious circle. If you operate, there may be more scarring. Also, because the nerve roots are so intertwined with the scar tissue, you can permanently injure the nerve roots, and that is a reason to hesitate about re-operating on a patient.

Q Doctor, I note the operating surgeon's report indicates that the dural sleeve was cut.

A Well, I am not sure if that is an operative report or a myelogram report. Let me check that.

Q I think it is the first operation --

MR. SCHULTZ: I am going to object to counsel's statement.

THE COURT: The doctor is looking is up to find out exactly what it was.

THE WITNESS: Unfortunately, I have only an abstract

of this operative note. If you show me the original. I don't include that statement in mine.

THE COURT: What are you referring to?

MR. LASSOFF: This is Exhibit 6, your Honor.

THE WITNESS: Yes, this is the operative note dated December 5, 1973, and it describes the nerve root was seen to be markedly adherent with scar and frayed, and there was a small rent in the dural sleeve, and this was closed. Now, a rent in the dural sleeve, the dural sleeve is the membrane, as I said. The dura is a membrane that encases or contains all of the nerve elements in the canal and separates those nerve elements from the bone, which is the canal itself. The dural sleeve is simply an extension of this membrane out through the foramen or opening with the nerve root. It becomes a part of the periosteim of the bone, the covering of the bone, and then when the nerve is outside of the spinal canal, the dural sleeve is gone. So that dural sleeve is the little portion of the left side lower down that I noted was cut off in the myelogram, and in this case it indicates that there is a rent or tear in the dural sleeve which was found at operation. Now, whether this was found at operation, having pre-existed as a small rent or whether it was produced by the operating surgeon in the area of the adhesions is very difficult for me to tell.

THE COURT: What is the effect of it, Doctor?

THE WITNESS: Well, a rent at the dural sleeve may have no symptoms. The problem is that it must be repaired, if at all possible, because if you leave an opening in the dural sleeve, then it is possible to have an arachnoid cyst, and that is the fluid beneath the dural will bulge out through the small opening and form a cyst, which will then compress the nerve and the nerve elements.

THE COURT: They say that they repaired it?

THE WITNESS: Yes, I would say there is no significance in itself in the rent in the dural sleeve, only to see that a sub-arachnoid cyst will not form.

Q Will you continue with your examination.

A Well, essentially, those were the records. The man received extensive neurological and neuro-surgical care for the multiple injuries, primarily the back injuries, with two operative procedures.

When I saw him he was still having residual complaints, and he said that between the time that he had the laminectomy, which was done in 1973, and the time that the had the Rhizotomy, which was done in October of 1974, he had to wear the transcutaneous nerve stimulator to get any relief from pain. He would be in pain, unless he would use the stimulator, and that relieves pain by, in a sense, producing

another impulse. It is not really pain, but very much like an acupuncutre, plus something else, and that will relieve pain in a referred manner.

He said following the second operation, which was the Rhizotomy, he was still disabled, he still had pain in the neck and the back, he had limitation of motion of the back, he had pain in his hips, and severe pain in the right lower extremity. He complained of weakness in the foot on the right and of numbness and pain and needles sensation in the ankle, and a stiffness in the neck region. He also continued to have what he had described for a long period of time following this injury, and that was a potency problem. The patient has a diminution in desire, and also a diminution in the ability to sustain erection and to engage in intercourse, although he made attempts to do it.

He continued also to suffer from headaches, from irritability, from ability to sleep, and he had difficulties at home resulting from his irritability.

He also complained of persistent right buttock pain with radiation to the right lower extremity, including all of the toes, frequent nausea and feeling of anxiety and market depression. At one time he had suicidal ideas because of persistent complaints. He still has some suicidal thinking at times, but he tends to control this now and he better able

to do it. He claims that he has to limp because of his symptoms, as a loss of grasp of his right hand and is constantly dropping things, and numbness in both legs. He has had allergic reaction to some of his medications, with the occurrence of hives and an upset stomach on occasion.

He still requires the use of a cane and still wears a corset. He cannot sit for long periods of time, has difficulty in bending and lifting and walking up and down stairs, and is constantly under sedation, usually sedatives or tranquilizers. Essentially, that was his history.

His past history, he told me that he had no previous difficulty with his back or his legs. He had no previous histories. He has had a hernia and some high blood pressure, for which he had been treated. Other than that, his past history was unremarkable.

Now, on examination I found him to be alert and cooperative. He was very tense, obviously tense. He seemed depressed, particularly as he described all of his symptoms and their persistence. He seemed irritable at times to me, but I found no disturbances in sensorium, that is, he was not confused or disoriented, and had no other difficulties in terms of his mental status.

I examined his neck, where he had pain on motion. He had limitation of motion in his neck in extension or back-

ward movement, and also in lateral movement, or rotation to the right side.

Examination of the back revealed pain on motion of the back in all directions, but especially when he bent forward, or forward flexion and in lateral flexion to the right side. He had limitation of motion in these directions. He also had spasm or a tightness of the lumbo paravertebral muscles and the cervical paravertebral muscles, and a well healed laminectomy scar in the lumbo region.

He had markedly possible lasegue signs bilaterally, more severe on the right side as compared to the left. The lasegue test is a test in which the lower extremity is elevated over the examining table with the patient on his back, and this is done with the knee gradually extended. If the patient has a positive test, he had complaints of pain not only in his back, or limitation of motion in doing this test, but also pain shooting into the extremity. It is an indication of increasing the irritation of the nerve root by stretching it, because that motion stretches the nerve root.

He had a somewhat better lasegue when it was done in the sitting position, indicating that possibly some of the limitation may have been due to his anxiety and his discomfort at that time.

I tested his reflexes. A common reflex is the knee jerk. I found the right knee jerk was diminished as compared to the left. The ankle jerk, however, which was tested by tapping the tendon on the heel, appeared diminished on the left side and was normal on the right side. He had some weakness of the right foot and toes, but I could improve this weakness by suggestion. There was some question as to whether the pain that the patient was experiencing interferred with his ability to sustain muscle contractions.

A sensory examination disclosed diminished sensation to pin prick involving the entire right upper extremity extending to the circumferential line at the shoulder level, and also an area of diminished sensation to pin prick involvin the lateral half of the right lower extremity, including both thigh, leg and foot, not corresponding accurately to anatomical pattern. The patient walked with a limp favoring the right lower extremity, and his brace was removed for this examination.

THE COURT: A brace?

THE WITNESS: Not a brace, actually, a corsette.

Q Based upon your view of the records, the laminectomy, your examination, did you arrive at an opinion as to what injuries Mr. Chiarello sustained?

A Yes, I did.

Q Would you give us your opinion, please?

A Yes, in my opinion this patient sustained multiple injuries from this accident, prior to which he had none of these complaints, including injuries to his neck and low back, and the major problem has been with the low back region, where he had a disc herniation which was treated surgically unsuccessfully because of scarring and the fact the patient has had repeated chronic intractable pain, in spite of a Rhizotomy and in spite of the transcutaneous stimulation.

Q Can I stop you for a minute. When you use the word "intractable," what does intractable pain mean, Doctor?

A It is pain that is not relieved in spite of all methods of treatment. Essentially, this was his difficulty. My comments about his current situation in terms of potential surgical procedures which had been offered to him by his neurosurgeon, my feeling is very much the same as his own surgeon -- you can't assure this man that a further operation of his back is going to give him any relief, because if there is extensive scarring in addition to the disc protrusion which may have recurred at the same level, then the operation is not going to be helpful. It is conceivable that a spinal fusion, which has been mentioned as a possibility, might stabilize that area and prevent motion at that point, and that may give more relief than re-exploring the disc and the scar

tissue.

But even there is no assurance, and I would hesitat to be positive about asking him to go through such a procedure.

Q These further surgical procedures that you just mentioned, the spinal fusion and the re-exploration of the previously injured disc, are these considered major surgery?

A Oh, yes.

Q And a physician would have to decide whether or not to perform such operation? Knowing Mr. Chiarello's background would you perform either the re-exploration of the disc or the spinal fusion?

A I would not recommend it. I might add -- I am sorry -- I might add one thing, that I have described his physical problems, and not his emotional problems.

THE COURT: They are not involved in this case.

THE WITNESS: I am sorry.

Q I don't think you have finished with your opinion, Doctor?

A No, I have not. As I said, he had these injuries to the back and neck and had developed this depressive reaction.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A -- a depressive reaction with anxiety resulting in his mood disturbances.

THE COURT: Oh, no. Sustained.

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MR. LASSOFF: It is in the pretrial order.

THE COURT: There is nothing in the complaint nor in the pretrial order.

MR. LASSOFF: There is.

THE COURT: I read it very carefully during the luncheon recess, and I will not let this type of testimony in, unless it is specifically spelled out. It is not specifically spelled out. I am not interested in his psychiatric problems or terms of personality or anything like that.

MR. LASSOFF: Can I show you the pretrial order?

THE COURT: I have read it.

MR. LASSOFF: It says all these things.

THE COURT: I have read it. I don't know why you keep raising it. I sustain the objection and have for two days now.

Q Doctor, would you continue with your opinion, leaving that phase out.

A I think I have stated my opinion.

THE COURT: Can he work again, Doctor?

THE WITNESS: Well, in my opinion he can't do the work he was doing. I would suggest that he find something to

do to keep himself busy, some kind of occupation in which he can take time off because of his complaints. He cannot work at this time. He is still in pain almost constantly.

THE COURT: In other words, he can't work now? Do you think he will ever undertake some type of work, I assume not as a longshoreman or terminal superintendent.

THE WITNESS: I would hope so. I would recommend that he do something to keep himself busy and not have other problems compounding his physical problems because of his not doing anything and in a sense decreasing his masculinity.

Q But as of the time of your examination you felt he could not do any kind of work?

MR. SCHULTZ: Objection,your Honor.

THE COURT: Sustained.

Q As of the time of your examination what, if any, work capacity did Mr. Chiarello have?

A In my opinion he is disabled from working.

Q Doctor, I want you to assume that on June 30, 1972, Mr. Chiarello was in a stopped vehicle on the Bayonne Bridge and that vehicle was struck in the rear by a bus with such force to break the seat of the car and to throw Mr. Chiarello down flat in the seat, down flat on his back, and then it struck a car, his car struck a car ten feet in feet in front of him, throwing Mr. Chiarello back and throwing him over the

steering wheel, that at the time of the accident he was shaken and that he went to a doctor, Dr. L. Jackson Spitz on July 3, a Monday, who diagnosed his injuries initially as an acute tortocollis and low back derangement, that he thereafter came under the care of many doctors, a Dr. Urs in the Staten Island Hospital, that he came under the care of a Dr. Leventhal, a Dr. Friend, a Dr. Frank, a Dr. Lanier, a Dr. Friedman, and that a myelogram was taken at Richmond Memorial Hospital in Richmond, Virginia, in late January of 1973, which revealed the presence of a herniated disc at L4-5, and that surgery was performed at the Golden Isles Hospital in Hallandale, Florida, in December of 1973, where a laminectomy was performed at L4-L5, and in your opinion, Doctor, with reasonable medical certainty was this accident a competent producing cause of those injuries?

A Yes, in my opinion it was.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q Going one step further, I want you to assume that after the laminectomy the pain diminished for a while and then came back, and Mr. Chiarello was furnished with a transcutaneous machine that stops pain in some way, and that this did not work after a while, and that in October he was admitted to the Memorial Hospital, where a facet Rhizotomy

was performed, in your opinion, Doctor, with reasonable medical certainty were these procedures necessitated by the injuries Mr. Chiarello sustained in this accident?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A In my opinion they were.

Q Now, Doctor, I want you to go still further. After the Rhizotomy, Mr. Chiarello continued to complain of pain in the back, radiating down the leg, and a further myelogram was taken by Dr. Gervin, the neurosurgeon who performed the surgery and the Rhizotomy, and this myelogram which you yourself have read revealed the presence of another defect at L4-L5, in your opinion, Doctor, is that defect shown in the myelogram of July 28, 1975, caused by the injuries he sustained in the accident of June 30, 1972?

MR. SCHULTZ: I object.

THE COURT: Overruled.

A Yes, in my opinion it was.

Q Now, Doctor, this injury that Mr. Chiarello has, which eventually resulted in the first operation, was that a painful injury?

A Yes.

Q Would you explain the degree of pain that this causes prior to the excision of the disc?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Well, the pain is ordinarily confined to the back and shooting into or radiating into the extremities, in this case, the right lower extremity, and I can only tell you that the pain of a root irritation, a nerve root irritation is ordinarily intense, and that is one of the reasons why it is necessary to do something to relieve it surgically if it does not respond to conservative measures. I can only describe it that way. I would not know how to describe it in terms of degrees.

Q Does the pain increase in cases where there is scar tissue, as well as disc herniation?

A Well, one can have pain whenever the nerve root involved is compressed or irritated. Whether it is from disc protrusion or scar tissue which is constricting it or fraying it makes very little difference.

22 The major difference is that when there is scar tissue, the relief from such pain is very remotely possible compared to a disc without scar tissue, in which removal of the scar tissue will ordinarily give most patients who have been having intractable pain, relief. When there is scar tissue involved, since one cannot remove all of the scar tissue, the nerve root has already been involved by scar

tissue, then relief from such a procedure is not possible. There may be temporary relief as the combination of disc protrusion and scar tissue is removed. And then as scar tissue increases post-operatively, this pain can increase. So the pain associated with adhesions or scars around nerve roots is noted to be intractable pain.

Q This nerve stimulator or this machine, is that given in all cases of pain or only in special circumstances?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A No, it is used primarily in patients who have had no relief from other measures, such as medication, short of addicting the patient to narcotics, which, of course, might relieve pain, but which also makes them addicts. But short of that, in a patient with intractable pain, a nerve stimulator has now and then been used. As you may know, nerve stimulators are only on the market in the last five to six years. They were not really used before that.

THE COURT: No, we don't know.

A (Continuing) Only in the past six or seven years have they worked out some help for patients with intractable pain, and in the lower extremities, all we can use, really, is the transcutaneous stimulator, and for the upper extremities we can use a dorsal column implanted stimulator, in which case

an electrode is actually put on the spinal cord through an operation, and the patient can stimulate the spinal cord directly and in a way relieve pain, but mostly in the upper extremities, and very rarely does it work in the lower extremities.

Q Does the fact that this stimulator did not do the job and a Rhizotomy was necessary, does that have any effect on your opinion?

MR. SCHULTZ: Objection as to form.

THE COURT: Sustained.

Q Before a Rhizotomy is done, once again, is it done for ordinary pain or does it have to be more than ordinary pain?

MR. SCHULTZ: Objection.

THE COURT: It has already been answered. Next question.

MR. LASSOFF: I did not ask him about the Rhizotomy.

THE COURT: I am sorry.

A Yes, a Rhizotomy is never done for ordinary pain. It is a destructive operation, in which the nerve root is destroyed either by radio frequency current or by operating on the patient and cutting the nerve root in order to prevent the impulses of pain reaching the brain. So it is a destructive operation, reserved for patients with intractable pain.

Q And once that nerve root is destroyed, can it ever be fixed again?

A If it is destroyed surgically, no. If it is destroyed by radio frequency current, sometimes there is regeneration of fibers, because one never knows if they have been totally destroyed.

Q So that even if you have a Rhizotomy, those fibers may regenerate themselves?

A Yes, sometimes.

Q So that even if you have a Rhizotomy and the pain stops for a while, these nerves may regenerate and cause pain?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, in the manner I have described. The operation is designed not to have that happen, but I would say in about sixty percent of the patients there is some regeneration, because in the effort to prevent the impulse from spreading to other areas, it is localized to one area, and there may not be maximum destruction at that area.

Q Now, Doctor, when you examined Mr. Chiarello did he appear to you to be in pain?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Well, I would say during the examination, yes.

Q To what degree of pain did he appear to you to be in?

MR. SCHULTZ: Objection.

THE COURT: I don't understand. He was in pain. The plaintiff has been on the stand to describe his pain. What more do you want?

MR. LASSOFF: That is true, your Honor.

Q Doctor, in your opinion the injuries that Mr. Chiarello sustained in this accident, has he been totally disabled from the date of the accident, June 30, 1972, until the present time?

MR. SCHULTZ: Objection.

THE COURT: He wouldn't know. Objection sustained. He only saw him for the first time ten days ago.

Q Based on your examination of ten days ago, Doctor, can you think of anything, any type of work that Mr. Chiarello can do at the present time?

THE COURT: We have been through that.

Q If a spinal fusion were to be performed, would that relieve the pain?

MR. SCHULTZ: Objection, your Honor.

THE COURT: He has already given us his testimony. He would advise against it.

MR. LASSOFF: I have no further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q Dr. Kaplan, you have testified in behalf of clients that I have represented in the past, isn't that true?

A That is correct, yes.

Q You and I are not strangers to one another?

A That's correct.

Q Doctor, in this particular instance, the involvemen that you describe was between the interspace between L4 and L5? Is that correct?

A Yes, sir.

Q Now, Doctor, you told us that the operative record indicated that there were adhesions and scarring in and about the L4 nerve root?

A Yes.

Q Is that correct?

A Yes, that is what the operative note stated.

Q Doctor, is there any way of telling, do you know of any way of telling as to how long or the age of that adhesion or scar?

A Not accurately. One can only state it was going on for months, not a few days or a few weeks. It usually is

months; it is usually the result of bleeding in the area.

Q It is the result of hemorrhaging, technically?

A Yes.

Q With reference to the etiology or the duration of those adhesions and scarring, you can't tell by looking at that as to how long they existed?

A That is correct.

Q It is entirely possible that those adhesions and scarring pre-existed this occurrence?

A Well, it is possible, but it is not reasonable from the medical viewpoint with this history.

Q But, sir, you could not state with reasonable medical certainty that they did not exist, could you?

A Well, I could state with reasonable medical certainty or probability on the basis of this history and story that they did not exist prior to this injury; I can't state it with absolute certainty, which is never possible, anyway.

Q But, Doctor, it is possible it existed prior to this occurrence?

A I suppose anything is possible.

Q It is possible?

A I said almost anything is possible, yes.

Q And you can't state with any degree of real

certainty as to how long they existed?

A I don't know what you mean by real certainty.

MR. LASSOFF: May we have the doctor's answer.

THE COURT: He said he does not know what he means by real certainty.

MR. SCHULTZ: I withdraw the question.

Q Now, Doctor, when you looked at the three X-rays that you had put apart from the others, you stated that there was some interference with the outline of the pantopaque?

A Yes.

Q And you ascribed this interference to either a protrusion or scar tissue?

A Well, yes. I would say part of the defect is either from that or scar tissue. Some of the defect is from scar tissue in my opinion.

Q But you cannot state whether it is from a protrusion or scar tissue, either one?

A At the level of L4-L5 I can't state that it is definitely a protrusion rather than scar tissue. I will state there is evidence of scar tissue at other levels just about it, yes.

Q Doctor, isn't it fair to state that when the pantopaque is strung out, as it is, sort of frayed, that it usually is the result of scar tissue as opposed to protrusion?

A Yes, in the area where it is strung out, definitely I thought I described that, yes.

Q Now, Doctor, in this particular case where the operative record describes a rent in the dural sleeve, and apparentely it was sutured or repaired with one suture, I believe, that is of no significance, is it, really, to you?

A Well, not really, no, in terms of any symptoms, if that is what you mean.

Q Yes, sir.

A No.

Q Now, Doctor, your expertise is that in the nerve distribution field and nerves? Isn't that true?

A Yes, sir.

Q Now, Doctor, when one sees or a doctor of your caliber and understanding --

THE COURT: That takes care of your qualifications, Doctor.

THE WITNESS: I know him too long.

Q When one of your caliber states that the loss of power is non-anatomical, would you tell us what you mean by that?

A Yes, I thought --

Q Or what anybody would mean of your caliber, an expert?

A Well, I will tell you what I mean, because I use the term frequently -- others do as well. It is when the distribution of the diminished areas of sensation do not conform to the anatomical representation of nerve roots on the skin, and it is the kind of distribution which we see when the problem is, as far as the testing result is concerned is primarily psychological or psychogenic, rather than a physical disruption of that nerve root.

Q In other words, Doctor, the patient is either saying that there is pain or a lack of sensation when there is no physical reason for him to say so?

A Well, I guess you can say it that way. He is not saying it necessarily purposely. Sure, he does not feel it, but the reason for his not feeling it is not because of a physical result of that particular nerve root.

Q In other words, Doctor, it is not in accordance with the distribution of the nerves, but it is purely himself?

A Well, his psychological reaction to whatever his problems are.

Q He could be exaggerating, too, not this man, but anyone who does not act in accordance --

THE COURT: We are interested in this man, not with anyone. We will be here for the rest of our lives. Let us take it as to this man and this doctor's examination of

this man.

Q Well, Doctor, did you find in examining this gentleman that the weakness that he apparently claimed in his right foot was not in accordance with the anatomical distribution?

A Oh, yes, I have explained that, that he had better power than he thought he had, and I attributed that partially to the effect that he had pain on motion and would not permit contraction of the muscles because of the discomfort. When I reassured him that it was only for a second and that he did not have to keep it up very long, his power was better.

Q Doctor, pain is purely subjective, isn't it?

A Yes.

Q It is wholly within his control? He says to you it pains or it does not?

A It is not in his control, but it is a subjective complaint.

Q You have to rely on the integrity of his complaints

A Yes. It is not difficult to do so with his background and surgical findings.

Q With relation to his right ankle jerk, did you find it to be more active than the one on the left?

A I did, yes.

Q And if another doctor said that on the day before that he had no right ankle jerk, what would your opinion be?

A I would want to know who the doctor was first.

Q If you found the right ankle jerk to be more active than the one on the left and another doctor said the day before he found absolutely none, no right ankle jerk, would that indicate anything to you?

A Well, I really don't know, because I don't know who examined him, how he examined him, whether he examined him in one position or three positions. If one does not find an ankle jerk in one position, he may find it in another. If all of these things were done and there was not any ankle jerk, I would not be able to explain it, because he had a good ankle jerk on that side when I examined him.

Q It is a reflex action over which a patient has no control?

A Generally, yes.

Q Now, Doctor, you did a sensory examination on this gentleman, did you not, with a pin prick?

A I did.

Q And, Doctor, did you find that he described a loss of sensation in certain areas where there was no nerve indication, where he should have had no loss? Isn't that true?

A Not a loss, but a diminished sensation. He said it did not feel as sharp in that area which I have described as compared to other areas.

Q Doctor, that was not in accordance with the anatomical distribution of the nerves, was it?

A That is correct.

Q In other words, it was not in accordance with the physical facts, was it?

A Well, it is a physical finding; it is not in accord with specific nerve roots or peripheral nerves, that is correct.

Q His alleged diminished sensation did not follow the normal nerve patterns?

A That is correct.

Q Incidentally, different nerves come out of L4 and L5, and there is a portion between L5 and S1 which we normally refer to and you refer to it as the horse's tail? Isn't that correct?

A Well, all of the nerves between L1 and the sacrum, the group of nerves called the cauda equina, because all of the nerves are coming down together, and there is no spinal cord below the level of L1.

Q That is referred to as the horses tail?

A The translation of cauda equina, yes.

Q You told us about portions of his nerve distribution that deals with the sacrum or sacral area?

A Yes.

Q That also involves the nerve distribution for impotency, isn't that true?

A Well, yes. The physical reasons for impotency are many, but one of them can be interruption of the lower sacral segments, that is, sacral 3, 4 and 5 can be involved and produce potency problems.

Q But you didn't find any involvement there?

A No, I didn't.

Q You did not find any neurological bases for any impotency?

A I did not.

THE COURT: Did you examine him for it?

THE WITNESS: Yes, I described it, I indicated that in my opinion his potency problem was part of the psychological reaction, rather than a physical one.

MR. SCHULTZ: I move to strike, your Honor.

THE COURT: Overruled. I asked him a question which happened to bring out that answer, and I won't strike it.

MR. SCHULTZ: May I respectfully object, if your Honor please.

THE COURT: Yes.

Q Sir, you did not, however, find any neurological involvement that would cause impotency?

A I did not.

Q Now, Doctor, this transcutaneous nerve stimulator, does it cause burns?

A Cause what?

Q Burns to the body?

A Well, if it does it is defective. It is not supposed to. I must add one statement to that, if it is used continuously to one area there can be pigment changes in the skin itself, not a burn, but pigment changes from repeated stimulation of the same area.

Q The transcutaneous nerve stimulator if used properly, will not cause burns?

A No, it is not supposed to.

Q Now, Doctor, when you saw this man on this one occasion, did you have in your possession reports of other doctors in letter form?

A Yes, sir.

Q And these reports were not portions of hospital records, were they?

A Some were not.

Q Some were not?

A Yes, some were not. That is what I said.

Q And, sir, did you use these letters or reports that were not part of the hospital records in the formulation of your opinion?

A I can't say that I did. I reviewed the hospital records primarily for the procedures which were done and made my own examination for his current situation. I read all the records, I was aware of the contents.

Q I am talking about reports from other doctors?

A I read all the reports available, but I did not make conclusions which I obtained from those reports.

Q You did not use them in your opinion?

A No, not really.

Q Now, Doctor, when you saw this man for the first and one and only time did you reach a conclusion that he could never work at any occupation?

A I never stated that.

Q Doctor, is it your opinion that he could perform some sort of sedentary work?

THE COURT: At this time?

A Well, at this time I would say no. I think he is in too much a state of discomfort to warrant that kind of occupation, but hopefully he might improve with new kinds of stimulators devoted to getting relief long enough, and if he

has a job which would permit sedentary work, it is possible he can do some work, which I would advise him to do.

Q Doctor, do you have an opinion with reasonable medical certainty that at some future time he will be able to do some sedentary occupation?

A In the limited fashion I have described.

Q Do you see any reason why he could not work as a bookkeeper or an any of these sedentary occupations?

A I see reasons why he could not, because he can't sit too long.

Q Do you see any reason why he could not do some sedentary occupation?

A If he has an occupation in which he has time off or perhaps can work at his own rate of speed, possibly, yes.

Q Doctor, in your opinion is this man capable of driving an automobile?

A In a limited fashion he may be, that is, for a short period of time, if he is able to use that extremity, if he gets relief from his pain with newer techniques, he may be able to.

MR. SCHULTZ: I have no further questions.

MR. LASSOFF: I have just a few, your Honor.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Dr. Kaplan, you examined Mr. Chiarello both neurologically and psychiatrically, did you not?

A Yes.

Q These questions that you were asked by Mr. Schultz as to non-anatomical patterns, are they caused by something called conversion phenomena?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

MR. LASSOFF: This was brought out by Mr. Schultz on cross-examination.

THE COURT: I sustain it.

Q In your opinion, Doctor, what caused the non-anatomical

MR. SCHULTZ: I object.

THE COURT: Let him finish the question.

Q What caused these non-anatomical patterns of pain or complaints?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A In my opinion the non-anatomical features of the examination were part of what is described as a conversion reaction. It is a psychological reaction.

MR. SCHULTZ: I object.

THE COURT: Overruled. You brought out this matter about it being non-anatomical. Let us find out what it is.

A It is a part of a psychological reaction in which a patient's anxiety, anxiety about an extremity which is painful in this case, or any other physical area of discomfort is converted into a physical finding, even though there is no anatomical interruption of nerve elements; it is an unconscious conversion which we call a conversion reaction, part of an anxiety or an emotional reaction in patients who are depressed or anxious about a painful area of their body. It is commonly seen.

Q Is that reaction as real to the patient as if it followed an anatomical pattern?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A A conversion reaction with its physical symptoms is real, as real to the patient as a physical discomfort or pain, and sometimes more disturbing.

MR. LASSOFF: Thank you, Dr. Kaplan.

THE COURT: I would like to ask you a question, Doctor.

XXX BY THE COURT:

Q If we take into consideration this non-anatomical reference, deduct that from the full condition that you have described this plaintiff to be in, how different would his condition be?

A Oh, I would say not very much, because the large part of his disability is pain, rather than the sensory abnormality.

Q In other words, the pain would still be there attributable to the back involvement?

A Correct. Yes, sir.

THE COURT: You may step down. Thank you.

(Witness excused.)

THE COURT: We will have a short recess.

(Recess.)

L E S S E P L A K I, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Dr. Seplaki, will you tell us your occupation?

A I am associate professor of economics at Rutgers University, the State University of New Jersey.

Q Will you tell us about your educational background?

A I hold a Bachelor's degree, majoring in economics from Sir George Williams University, Montreal, a Master's degree in economics from McGill University, Montreal; I hold a Ph.D. in economics from the University of California; I have done one year of post-doctoral work in economics at the University of Chicago.

Q Can you tell us about your work experience?

A I have taught at the University for the past 10 years, economics courses, professorial activities in research, and publication of some 24 or 25 articles in economics.

Q Is part of economics inflation and depreciation?

A A consideration of these problems is, yes.

Q At my request did you make a survey of the trends of the last 10 years, the future trends with regard to inflation and depression?

MR. SCHULTZ: Objection as to form.

THE COURT: Reframe your question.

Q Did you do any work in determining the trends in inflation and depression over the last few years?

A Yes, I have.

Q Would you tell us what your work consisted of?

A I have studied projected data published by government agencies, such as the United States Department of Labor, the United States Department of Commerce, and information put

out by the Federal Reserve Board.

Q What do these various sources of information reveal to you?

MR. SCHULTZ: Objection.

THE COURT: On what ground?

MR. SCHULTZ: First of all, your Honor, as to what happened in the past I don't think is particularly relevant. As to whathis projection may be has to be pure speculation.

THE COURT: The New York Times does it every day in the week, and so do all the governmental agencies, and there can be a reference to the history of the past. Objection overruled.

MR. SCHULTZ: I object on the ground that it is pure speculation.

THE COURT: It is not pure speculation. It happens to be what this country runs on. It may not be good, it may not come out the way you think it is going to come out, but it will be up to the jury as to how much credence they will give the testimony. Objection overruled.

Q Will you tell us what your research revealed to you?

A Well, in terms of inflation, it is a problem, an economic problem, like in any country. It is the oldest malady that the country has to contend with. We have been

experiencing inflationary rates for as many years as one would like to go back. The rate of inflation, that is, the inflation experience per annum during the past few years has been accelerated.

THE COURT: When you say the past few years, what do you mean?

THE WITNESS: The past ten, 12 years, the post-war period actually has been accelerated to the point where in 1973 and 1974 the average rate was approximately 11 percent.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q I didn't hear your answer.

A Approximately 11 percent.

Q Now, would you tell us what factors you consider in determining this rate of inflation?

A Essentially, statistically speaking, inflation is measured by a price index, the consumer price index, specifically, and using as a basis here 1967, which constitutes 100 percent, the data projection on consumer prices has risen over 100 from the year 1967. Now, there are indices which do not use the base here of 1967. The base years are reviewed and changed from time to time. The current base year is 1967, and the data suggests that prices

have been increasing since 1967 at the rate as I suggested, constantly accelerating, having reached 14 percent in 1974, and approximately 11 percent in 1975.

Q If we go back to the base of 1967 as 100 percent, what would that be as of the end of 1975?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: I will sustain that. It is the annual increases that count.

Q Between 1967 and 1968 will you determine the rate of inflation?

MR. SCHULTZ: I am going to respectfully object. This is highly speculative.

THE COURT: I assume the rates are published. The government publishes these figures, Mr. Schultz.

MR. SCHULTZ: The rates of inflation have to be different for different localities; they have to be different, as to different products. It cannot be generalized.

THE COURT: For your information, the Congress of the United States has given the President of the United States the power to each year fix the amount of inflation based on the figures available, and based on those figures the salaries of federal employees are adjusted.

Q Can you tell me have you done a survey on current economic conditions in this country, in the United States,

mmcg Seplaki-direct

and, in particular in the State of New York and its environs?

A I am aware of the economic conditions. I constantly observe economic conditions in the country.

Q Did you also observe it in all parts of the country?

A Specifically speaking, no. I tend to take a national approach to it.

Q If you were going to take an approximation of the anticipated rate of inflation for the next few years, what would you consider the rate of inflation to be?

MR. SCHULTZ: May I have a continuing objection?

THE COURT: Sure you can. The objection is overruled.

A I will say that an inflation rate, annual inflation rate over a period of 10 years, 15 years of at least seven, seven and a half percent, possibly eight percent, can be anticipated. And if the government decides to preoccupy itself with the elimination of employment or the reduction of unemployment, the traditional means that the government will use to reduce unemployment are such, are inherently such that tend to contribute to inflation, tending to increase the inflation. I would argue that --

THE COURT: We are not interested in your argument; we are interested in the facts to the extent that you

can give us the facts?

A (Continuing) It is a fact that if the government is pre-occupied with unemployment, traditionally those measures will increase inflation, that can be done only at the expense of inflation.

Q Doctor, did you in the course of your calculation make any calculation with regard to what Mr. Chiarello earned the last few years that he worked and the effect of inflation upon that in the future?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A I was given information concerning Mr. Chiarello's earnings during 1972, more specifically, the first half of 1972, prior to his injury. I then proceeded to use those actual earnings as displayed by the 1040, a copy of which you gave me, applying a six percent inflation rate, only a six percent inflation rate, and I projected that through his working life period of 30 years, and I discounted that at 5-1/2 percent to the present value. I have done so, yes.

Q The figures you are going to give us now have both inflation and present value of a dollar in them?

A Yes.

THE COURT: How did you take only five and a half percent?

THE WITNESS: Well, the interest rate, the traditional interest rate for this type of calculation would be, your Honor, between 5-1/2 percent and 6 percent. Under no circumstances would it exceed 6 percent. The answer to that question is that the alternatives available to the average person for investment are such that yield 5-1/2.

THE COURT: He could put it in a savings bank on a two or three years certificate of deposit and get more than that. Have you got a better risk proposition than that?

THE WITNESS: Government Series E bonds would perhaps be better than that.

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THE COURT: You think that is what the normal person does, rather than put their money in a savings bank?

THE WITNESS: I would say the average person would put his money in a savings bank.

THE COURT: It would be up to the jury to determine.

MR. SCHULTZ: May I respectfully object even on the basis of a 30 year life expectancy.

THE COURT: What is the figure?

MR. LASSOFF: My client is 39 now; so 65 gives him 26 years.

MR. SCHULTZ: I respectfully object. This is highly speculative, your Honor.

THE COURT: The 26 years is not speculative.

MR. SCHULTZ: It is.

THE COURT: I am sorry. I am going to charge the jury that is the figure. His work expectancy under the decisions in this circuit is 26.

MR. SCHULTZ: Even with hypertension and obesity?

THE COURT: That you can argue to the jury.

THE WITNESS: May I explain the 30 years.

THE COURT: You can't. His work expectancy goes to 65.

THE WITNESS: The last four years essentially amount to a minimum of $100,000 difference, $110,000, which I would subtract from the figure.

Q Give us the figure for a 26 year work expectancy?

MR. SCHULTZ: I object.

THE COURT: Overruled.

A That would amount to approximately $600,000.

Q And what is that figure?

A That figure is the present value of Mr. Chiarello's foregone earnings, that is, in terms of wages.

Q That is the present value with that percentage discounted, with inflation added? Is that correct?

A That is correct.

MR. LASSOFF: Thank you very much, sir.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q Have you ever worked for the Federal Reserve System?

A No, sir, I have not.

Q Have you ever worked for an insurance company?

A No, sir, I have not. I have been teaching in universities since my graduation.

Q Have you ever worked as an actuarian?

A No.

Q Now, sir, are you familiar with the fact that if one were to invest $100,000 that the interest rate would be negotiable on a certificate of deposit?

A It may very well be.

Q Are you familiar with that?

A Yes, depending upon the risk one would want to take.

Q A certificate of deposit in a bank --

MR. LASSOFF: Certificates of deposit don't really work that way, unless we are going into the whole history.

THE COURT: He can ask the witness. He is testing his credibility.

A I don't believe they are negotiable. There are certain terms at which you can buy these certificates.

Q Aren't you familiar with the fact that under the banking regulations if there is a certificate of deposit, where the amount is in excess of $100,000 the interest rate is negotiable?

A I was not aware of that.

Q And, sir, are you aware of the fact that the interest rate on certificates of deposit even for six years is 7.7?

A I am aware of that, yes.

Q Are you aware that if you leave it in, it accrues up to 8.1?

A I am aware of that, yes.

Q And, sir, are you aware of the fact that this man claims to have made $17,000 or $16,000 a year?

A I am aware of that.

Q At 8.8 percent how much would have to be invested to give him an annual yield of $16,000?

A I would have to take the tables.

THE COURT: He is asking you a question. Can you work it out while you sit there?

THE WITNESS: Can you clarify that a little more specifically?

THE COURT: I thought the figure was $17,000.

MR. LASSOFF: $16,000 and a few pennies more.

MR. SCHULTZ: Some years were below 16.

THE COURT: All right, 16.

THE WITNESS: Will you repeat the question.

Q What amount would have to be invested at 8.1 percent to yield $16,000?

THE COURT: For the next 26 years, at the present value of the dollar so that at age 65 it is all used up.

THE WITNESS: I don't understand the question.

THE COURT: Maybe I ought to let the jury know what is going on.

I am going to charge you, in any event, when it comes around to submit the case to you as to this, and what we are trying to show is what the amount given to somebody today and invested at a set rate of interest will return $17,000 a year each year until the plaintiff reaches the age of 65, when there is no money left then. In other words, he has used it up. Now, obviously, it is less than 16,000 times 26, because the interest accrues to the basic principal amount that is put in, and what you have to do is put money in to which interest is added, from which you deduct $16,000 each year, so when the plaintiff reaches the age of 65 he will have received $16,000 each year, and then there is nothing left after to pay him.

MR. LASSOFF: I request your Honor add the factor

of inflation.

THE COURT: We are not in that area yet. Why are you messing it up? We are just trying to figure out the present value of the dollar without regard to inflation.

Can you work that out for us?

THE WITNESS: Yes, I would say approximately $500,000 today at 8.81 percent interest -- that is the interest you choose to use -- at $16,000, $17,000 would exhaust the funds at the end of a 26 year period.

Q That takes into consideration, does it not, the inflation rate, too?

A Not per se, no.

Q What do you mean by not per se?

A Well, it doesn't.

THE COURT: It does not. That is the other half of the coin, which I assume Mr. Lassoff is going to pick up when you sit down. We are only interested in reducing the total overall recovery to the present value of the dollar, and Mr. Lassoff wants to put an inflation rate in, and the Court of Appeals says you consider both.

28 Q Have you ever, sir, worked in an investment house?

A No, I have not.

Q Have you ever testified before?

A Yes, I have.

Q For whom?

A In the City of New York.

THE COURT: Any place in court?

THE WITNESS: Would you like me to give you a history of the names of attorneys I have testified for?

Q Did you always testify for plaintiff's?

A So far I have, yes.

THE COURT: How many times have you testified?

THE WITNESS: Approximately four times during the past year.

THE COURT: And how many times a year before that?

THE WITNESS: That is the extent of my consulting experience.

THE COURT: Four times he has testified.

THE WITNESS: It has been all four plaintiffs.

MR. SCHULTZ: No further questions.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Doctor, you told us the present value of the money necessary to give Mr. Chiarello an income of $16,000 a year at 8.1 percent amounts to 500,000. If you add inflation to that, what would the necessary sum be to give him the reduced value of the dollar due to inflation?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A At 6 percent annual inflation?

Q If that is your figure.

A I would estimate about $600,000.

MR. LASSOFF: Thank you, Doctor.

THE COURT: So you need $500,000 to give the plaintiff $17,000 a year at the present value.

THE WITNESS: Yes, sir.

THE COURT: You need $600,000 to give the plaintiff $17,000 a year at present value?

THE WITNESS: Yes, sir.

THE COURT: You need $600,000 to give the plaintiff $17,000 a year considering inflation at the rate of 6 percent?

THE WITNESS: Right.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. LASSOFF: I still have the deposition. I understand it is not yet signed.

THE COURT: Has your client been able to look at the deposition?

MR. SCHULTZ: No, but I will consent that he can

read it, Judge.

THE COURT: Is that the end of your case?

MR. LASSOFF: Except for one witness, a short witness, tomorrow.

THE COURT: No witness tomorrow.

MR. LASSOFF: He was subpoenaed.

THE COURT: It is your duty to keep the time of the court and the jury occupied. You stopped at 12:20; you didn't have anybody to go on. Now it is only ten after four and you want to quit again. This was supposed to be a two or three days case, and the defendant obviously has to be afforded an opportunity to put his case on.

MR. LASSOFF: I really don't need the witness tomorrow.

XXX (Plaintiff's Exhibit 12 marked for identification.)

MR. LASSOFF: I am going to read the whole thing.

THE COURT: It does not have to be marked for identification if you are going to read the whole thing.

MR. LASSOFF: This is an examination before trial of Henry Girwood taken by plaintiff pursuant to notice dated March 21, 1974, held at the Federal Court, New York, New York, on April 11, 1974 at 2 o'clock p. m. before a notary public of the State of New York.

Appearances: Martin Lassoff, Esq., Attorney for

plaintiff, and Daniel J. Kaufman, Esq., Attorney for defendant by Salvatore Moscatt, Esq., of counsel.

"H E N R Y G I R W O O D, one of the defendants herein, having been first duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

"EXAMINATION BY MR. LASSOFF:

"Q What is your name and address?

"A Henry Girwood, 268 Davis Avenue, Kearny, New Jersey.

"Q Mr. Girwood, by whom are you presently employed?

"A By Domenico Bus Services.

"Q In what capacity are you presently employed by Domenico Bus Services at the present time?

"A As a bus driver.

"Q On June 30, 1972, were you employed by Domenico Bus Services in that capacity?

"A Yes, sir.

"Q About 6:00 to 6:30 on that day, was the bus you were driving involved in an accident?

"A Yes, it was.

"Q Where did that accident take place?

"A On the approach ramp to the Bayonne Bridge in Staten Island.

"Q Do you know the number of the bus you were driving on that day?

"A I do know the number, but I don't have it with me."

I'm leaving out the next question; there is no answer to it.

MR. SCHULTZ: It was not filled in because I only got it on January 8.

MR. LASSOFF: (Continuing)

"Q What time did you start working on June 30, 1972?

"A 6 o'clock in the morning.

"Q And what time did you stop working that day?

"A I was finished at 9 o'clock in the morning and then I went back to work for afternoon for the commuter run.

"Q In other words, this is basically a commuter bus company and you worked mornings and evenings?

"A Yes, sir.

"Q Where did this trip, I take it, starting some place in New Jersey, where did this trip end, some place in New York?

"A Going from the Port Authority Bus Terminal in New York City, through the Lincoln Tunnel, through Hoboken, across the New Jersey Turnpike Extension into Bayonne along Hudson Boulevard, and then Bayonne and then over the Bayonne

mmcg "Girwood

Bridge to Staten Island, and then Staten Island to Forest Avenue and Clove Road and Hylan Boulevard.

"Q I take it that at the time this accident occurred you were going over the Bayonne Bridge into Staten Island?

"A Yes, sir.

"Q Do you have any idea how many passengers you had in the bus?

"A Yes, I had a full bus load: 51 persons.

"Q Any of your passengers standing?

"A They were all seated.

"Q Was anybody else in the employ of the Domenico Bus Company in the bus when this accident occurred?

"A No, there was not.

"Q Can you tell us the manufacturer of this bus and the year of this bus?

"A It is a GM Coach, but I am not sure of the year because its model is the same year after year, but I would venture around 1965.

"Q How wide is that bus and how long?

"A About 8 feet wide by 38 feet long.

"Q Where you sit in the bus, is that on a raised platform or above or below the level where the passengers sit?

"A It's on the floor level, which is one inch below

the raised seats of the bus.

29 "Q Can you tell us with reference to the front window of this bus how high from the floor level does this commence and how much distance is there to where the window sees?

"In other words, how wide is this window?

"A The window is a full eight feet wide.

"Q And it's covered?

"A Yes, sir.

"Q And how tall or high is this structure?

"A Four and a half feet.

"Q Now, in connection with the bus, when you operate the bus to see traffic in front of you, do you look through this bus window or do you have any mirrors or devices to see traffic in front of you?

"A No, directly through the windshield.

"Q In connection with traffic alongside or behind you, are there mirrors and, if so, what mirrors are there?

"A There are two outside mirrors which are convex mirrors which are mainly to look out and see out almost directly to my side, both sides.

"Q Just before this accident occurred, was there any vehicle either to the right or left side of your bus?

"A Yes, sir.

"Q Which side was the vehicle?

"A The left side.

"Q Was that going the same direction you were going or the opposite direction?

"A The same direction.

"Q Now, when this accident occurred, were you on the ramp leading to the Bayonne Bridge?

"A I was.

"Q At the point where the accident occurred, how wide was the ramp?

"A About 25 feet.

"Q Is that 25 feet wide in the direction you were going?

"A Yes, sir.

"Q Where was this car that was alongside of you with reference to the front of your bus?

"A To the left rear.

"Q How far?

"A At about just my engine.

"Q Your engine is in the front of the bus or the back?

"A The rear of the bus.

"Q Now, had you passed this car that you say was at the left rear of your bus at any time before this accident occurred?

"A No, he had caught up with me.

"Q He had caught up with you?

"A Yes, sir.

"Q Now, at the time of the accident, what were the weather conditions?

"A Wet.

"Q Was it raining?

"A It had just stopped raining.

"Q About how long before the accident had it stopped raining?

"A I had ridden throughout about 3 or 4 minutes. I had ridden throughout.

"Q Tell me how you got on the ramp leading to the Bayonne Bridge?

"A Well, along Hudson Boulevard and beyond is an intersection in the right lane and down the ramp and down the incline.

"Q You have to make a turn to get onto this ramp?

"A Yes, from the Boulevard it is about a 60 degree angle.

"Excuse me, and let me rephrase that.

"Taking a right angle I came this way and went 60 degrees off that, so actually I did not make much of a turn.

"Q Would you describe the ramp from the point where you entered the ramp to the point where the accident occurred?

"A I didn't hear you.

"Q The ramp, what does it look like from the point where you got on the ramp to where the accident occurred?

"A A downgrade and a puddle at the bottom of the downgrade where there is a sewer and the sewer was obviously clogged.

"Q Did the accident occur before you reached this puddle?

"A No, after the puddle.

"Q So you had gone through the puddle before the accident occurred?

"A Yes, sir.

"Q At the point where the puddle was, was there a dip in the road.

"A The puddle was in the dip?

"Q How far had you gone beyond that dip when the accident occurred?

"A Approximately 25 feet.

"Q When you entered the dip in the road, could you still see traffic in front of you, in front of the bus?

"A Yes, sir.

"Q Before you entered the dip in the road, how far

was the nearest car in front of you to the bus?

"A 75 feet.

"Q Was the car that your bus eventually came into contact with the car you say was 75 feet in front of you before you entered the dip?

"A Yes, sir.

"Q When you say the car was 75 feet in front of you, was there only one lane of traffic at that time or was there more than one?

"A There was only one.

"There was two lanes, but they were only using one.

"Q Would that be because it had recently stopped raining and the outer lane and inner lane of the road had lots of water on it?

"A Yes, sir.

"Q When did you first notice the car in front of you start slowing or stopping, if you noticed that?

"A About 50 feet in front of me when I seen the car ahead of him apply his lights first.

"Q So you could see the car in front of the car you eventually came into contact with apply his brakes?

"A Yes.

"Q Did you see the car directly in front of you apply his brakes as well?

"A Yes, sir.

"Q How far did the car in front of you travel from the time you first saw him apply his brakes until the time the accident occurred?

"A 25 feet

"Q At the time the accident occurred, was either the vehicle, the second car in front of you or the one that you came into contact with moving?

"A No, he was stopped.

"Q How long had they been stopped before the bus came into contact with Mr. Chiarello's car?

"A Just a matter of a second.

"Q How fast were you moving before you saw the other cars apply their brakes, apply their brake lights.

"A About 25 miles an hour.

"Q When you saw the other two cars apply their brake lights, what did you do?

"A I applied mine -- not with full pressure because I had gone through the water.

"Q In front of you were the two cars you have described, the car your bus came into contact with and the car in front of you that came to a stop, did you see another vehicle going through the puddle?

"A Yes, sir.

"Q Were these cars stopped while this other vehicle went through a puddle?

"A They had slowed down to let the vehicle go through.

"This gentleman had completely stopped and the car in front had completely stopped also, but had started to move up again.

"Q At any time before the accident occurred, did you attempt to change the lanes or to change direction of your bus in any way?

"A Yes, I did not change lanes but I did look at my mirror to see if I could get over past him on the left when I was starting to apply my brakes and I seen a slippery condition and I looked in my mirror and the guy was still hugging my left rear wheel.

"Q So at no point from the time you first saw the cars in front of you apply their brakes did you change lanes?

"A No, sir.

"Q What part of your bus was in contact with Mr. Chiarello's car?

"A The front bumper.

"Q Where did you strike Mr. Chiarello's car?

"A On the rear.

"Q Straight on from the front to the rear?

"A Yes, straight.

"Q At the point where this accident occurred, what speed were you proceeding.

"A My wheels were completely blocked at the speed of 20 miles an hour.

"Q What distance does it take you to stop your bus completely?"

MR. SCHULTZ: Your Honor, there is an objection on the record and I object.

THE COURT: You know the rule.

MR. LASSOFF: (Continuing)

"Q For whatever its worth, if you can answer that question, please do?"

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. LASSOFF: (Continuing)

"A I couldn't do it to be exact, for I am no expert but at 20 miles an hour, however, I think I can stop that bus in 30 feet in dry conditions.

"Q You have driven that bus in rainy conditions, have you not?

"A Yes, sir.

"Q And you have driven on that same ramp of the Layonne Bridge in rainy conditions?

"A Yes, sir.

"Q How fast under rainy conditions could you stop your bus under the conditions that prevailed at the time and place of the accident?"

MR. SCHULTZ: Objection.

THE COURT: Overruled.

MR. LASSOFF: (Continuing)

"A It would take about 50 feet, roughly.

"Q At the time this accident occurred, did your bus push Mr. Chiarello's car into the car in front of him?

"A Yes, it did.

"Q And how much distance was there at the point of the impact between Mr. Chiarello's car and the car in front of him that you said had started moving again?

"A About 10 feet.

"Q Did you getout of your bus after this accident?

"A Yes, sir, I did.

"Q Did you go to Mr. Chiarello to ascertain whether he had been injured?

"A Yes, sir.

"Q And did you also go talk to the car in front of Mr. Chiarello?

"A No; at that time that driver was already out of his vehicle and was walking back.

"Q Did you observe what damage there was to the car

mmcg "Girwood

in front of Mr. Chiarello?

"A No, I did not.

"Q Did you observe what damage there was to Mr. Chiarello's car?

"A Yes, sir.

"Q What damage did you see?

"A His front radiator was leaking and the back of his car was dented and the bumper pushed in and the tail light was broken.

"Q How about the inside of his car?

"Did you notice anything about the seats, and particularly the one he was sitting in?

"A No, sir.

"Q Did you notice that the seat had ripped loose and had completely stripped from the mechanism.

"A No, I did not, because Mr. Chiarello was out of his car by that time.

"Q Did you and Mr. Chiarello go into your bus to exchange license information?

"A Yes, we did.

"Q Incidentally, when you drove your bus to the other side of the bridge, did you take the names of various passengers that were injured in this accident?

"A Yes, I did.

"Q Can you tell me how many passengers were injured in this accident?

"A 51.

"Q All 51 reported they were injured?

"A No, I didn't hear you.

"No one was injured.

"Q You, your bus and Mr. Chiarello remained at the site where the accident occurred until the police came.

"A Yes, we did.

"Q Did you remain at that site until a second uniformed vehicle belonging to either the Triboro Bridge and Tunnel Authority or the Port Authority came?

"A The Port Authority came and sent over a yellow police car with the rubber bumper.

"Q Did you witness how eventually Mr. Chiarello's car got over this bridge?

"A Yes, they pushed it over.

"Q Was your bus able to move under its own power after this accident?

"A Yes, there was no damage to the bus.

"Q Did you continue to operate the bus on a regular run after this accident?

"A Yes, I did.

"Q Now, how did Mr. Chiarello appear to you when he

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came onto your bus?

"A Shaken.

"Q Did you speak to Mr. Chiarello on one occasion or more than one occasion?

"A I spoke to him on two occasions.

"I think I spoke to him when we had reached the other side of the bridge.

"Q And can you tell us what if anything you said to him besides from changing license information on either of those occasions?"

MR. SCHULTZ: Objection.

THE COURT: Overruled.

MR. LASSOFF: (Continuing)

"A I said, I am sorry.

"Q Incidentally, in the bus you were driving is there a speedometer or some other method of telling speed?

"A A speedometer, a tachometer.

"Q Did you see Mr. Chiarello's vehicle enter this ramp in front of you?

"A Yes, sir.

"Q Was your vision of anything in front of you in any way hampered by the fact that there was this dip in the road?

"A No, sir.

"But there is a bend where I lost vision of this car momentarily.

"Q Is that before or after the accident?

"A Before the accident.

"Q After the dip or before the dip?

"A After the dip.

"Q But you knew while you were still in the dip that the cars in front of you were braking?

"A No, I didn't know that they were braking until I got through and seen it.

"Q How much distance was there from the time you passed this point in the bend in the road to the point of the accident?

"A About 75 feet.

"Q So would I be correct in saying at least 75 feet before this accident occurred, you had Mr. Chiarello's car and the car in front of him in direct observation.

"A Yes, sir."

THE COURT: Do you wish to read any of that now or do you want to reserve that for your case?

MR. SCHULTZ: He has read it in its entirety.

MR. LASSOFF: Your Honor, should I put this in evidence if I want to read from it in summation?

THE COURT: It is in evidence.

MR. LASSOFF: Then I can read it.

XXX (Plaintiff's Exhibit 11 received in evidence.)

THE COURT: Pursuant to your commitment that you had plenty of time to have your witnesses here today -- it was not my ruling -- the plaintiff rests.

MR. SCHULTZ: If your Honor please, before there is a formal resting, could we have a conference at the side bar or in your chambers?

(In the robing room.)

MR. SCHULTZ: Your Honor, we discussed the collateral source rule before the luncheon recess.

THE COURT: I found a New Jersey case which says that under the collateral source rule you don't get the advantage of pension insurance. If you want the citation, it is on my desk.

MR. SCHULTZ: I attempted to find a New Jersey case by going to the law library in the courthouse.

THE COURT: I will give you the citation. There are two cases, Lawn against Landy, 35 New Jersey 44, 177, and Sporn versus Celebrity Inc., Atlantic 71,1974.

31 MR. SCHULTZ: I take it in light of your Honor's research and what you have just said to me that if I were to make an offer of proof through the plaintiff on additional cross-examination that he is receiving either pension or

insurance benefits, plus social security, that you would not permit that proof to be brought to the jury's attention?

THE COURT: That is true.

MR. SCHULTZ: The reason I wanted to make the offer of proof is that I am not certain in my own mind, sir, whether the jury is entitled to know that he is receiving social security.

THE COURT: I would say no.

MR. SCHULTZ: You see, I have been unable to find any cases, but it would seem to me that in justice if he is receiving certain amounts of money that it should be brought to the attention of the jury.

THE COURT: Not if you are the one who is the cause of his receiving the money because of your wrongdoing.

MR. SCHULTZ: In any event, I would like to make that offer of proof.

THE COURT: You have just made the offer of proof and I have sustained the plaintiff's objection to the introduction of any such proof.

(In open court.)

THE COURT: Thank you very much, members of the jury. Be here tomorrow morning at 10 o'clock.

(Whereupon, an adjournment was taken to January 15, 1976, at 10 o'clock a. m.)

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THOMAS J. CHIARELLO and
ANGELA CHIARELLO,

vs.

73 Civ 2962
75 Civ 1956

DOMENICO BUS SERVICE, INC.,
and HENRY GIRDWOOD

January 15, 1976
10 a.m.

(Trial resumed, jury absent.)

MR. LASSOFF: Your Honor, before the jury comes in, I know I started on two occasions to ask you to take judicial notice of a life expectancy table, but I don't think I finished it. I think the table shows 32.06 years for a 39 year old.

THE COURT: Of what?

MR. LASSOFF: 32.06 years.

THE COURT: Work expectancy is 26.

MR. LASSOFF: Right.

THE COURT: Where is this medical proof of payments, hospital payments?

MR. LASSOFF: It's in the records, your Honor, it's part of the records.

MR. SCHULTZ: I thought I saw one bill in one of those records.

MR. LASSOFF: I'll give it to your Honor before the time. I'll look through it.

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THE COURT: You want to rest then?

MR. LASSOFF: Yes, your Honor.

THE COURT: Motions?

MR. SCHULTZ: Yes, your Honor.

At this time the defendants in the action, your Honor, respectfully move to dismiss the plaintiffs' causes of action, first, on the grounds that they have failed to show any actionable negligence on the part of the defendant Henry Girdwood and Domenico Bus Service, Inc.

The applicable law, as I understand it, is the law of New Jersey. The law, as I understand it, the case law, is that the mere happening of an accident does not constitute an inference of negligence.

THE COURT: I so charge the jury.

MR. SCHULTZ: Further, your Honor, the mere fact that there was an accident involving the front of the bus and the rear of the vehicle does not give rise or a presumption to negligence in the state of New Jersey. I have researched the law and I could find no such case.

There has been no proof as to negligent operation of the vehicle of the defendant. All that has been proved was that there was an impact.

I respectfully urge the Court that there has been in truth no proof of negligence or actionable negligence on

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the part of the defendants in this case.

In addition to that, your Honor, I respectfully move at this point, and I urge it upon your Honor, to strike from this case the testimony, the opinion testimony, of Dr. Friedman, and the opinion testimony of Dr. Kaplan.

If your Honor will recall, Dr. Friedman was permitted to render an opinion predicated on reports and myelograms that were not then in evidence. Your Honor had specifically excluded them. And I asked Dr. Friedman expressly whether he had based his opinion in part on those myelograms and those reports and he said that he had.

Subsequent to his testimony I moved to strike his opinion, and your Honor said at that time that you were now, at that point, going to admit them into evidence.

I know of no rule of law that makes a previously inadmissible documentary evidence admissible merely because somebody used it in formulating his opinion. And certainly when he formulated his opinion it wasn't in evidence. And I don't think it became more admissible because he used it.

Dr. Kaplan used these myelograms and reports in formulating his opinion, and I strongly urge your Honor that the opinion testimony of those two doctors should be excluded on that basis.

THE COURT: Dr. Kaplan specifically denied that in

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his testimony. He was very careful to say that his conclusion is based on what he found, even though he did read the hospital records and the letter reports. He was very careful in his answer.

MR. SCHULTZ: I know he was, your Honor, because he's an experienced testifier, but he did not say that he did not use the myelograms in his opinion. He said he used them.

MR. LASSOFF: The myelogram was in evidence at the time Dr. Kaplan testified.

MR. SCHULTZ: No, it was not.

MR. LASSOFF: Yes, it was.

THE COURT: At the time Dr. Kaplan testified it was.

MR. SCHULTZ: I know, but it was in evidence because your Honor had admitted them after they had been excluded and after I made the motion to strike Dr. Friedman's testimony. So I strongly urge your Honor that on that basis the opinion testimony of both those doctors should be excluded.

THE COURT: Both motions are denied.

MR. SCHULTZ: May I respectfully except, your Honor.

THE COURT: You may.

MR. SCHULTZ: I also respectfully urge your Honor, and I don't know, I'm not familiar with this point, whether

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it requires a separate motion, but in the event it does, I'm going to make it.

I want to move that any cause of action for medical expenses and hospital expenses that are lodged in this particular case, be dismissed owing to the fact that there is no proof of medical expenses or hospital expenses at this time.

THE COURT: I gather that there is--

MR. LASSOFF: There are two authenticated bills in the hospital records which I will supply to you when I have a chance to do it.

THE COURT: He says he has one bill you saw?

MR. SCHULTZ: I saw a bill but I don't know whether it was certified or not. I just saw a bill.

THE COURT: Let's take the time out to find it.

MR. SCHULTZ: I want to move to dismiss any cause of action for medical expenses. Certainly there is no testimony as to that.

THE COURT: That's true.

MR. SCHULTZ: I'm going to also move about the hospital expenses because I saw no certified bill.

THE COURT: He's going to produce one, he says.

MR. LASSOFF: The St. Vincent's Hospital bill has a certified bill, your Honor.

THE COURT: Show it to Mr. Schultz.

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MR. SCHULTZ: That's right, your Honor, it has a hospital bill of $62.50.

MR. LASSOFF: There's a bill for $1,950 from St. Vincent's somewhere.

THE COURT: What exhibit?

MR. SCHULTZ: This is Exhibit 4, your Honor.

THE COURT: What hospital?

MR. SCHULTZ: St. Vincent's Medical Center of Richmond, which consists of $62.50.

THE COURT: All right. There's a $62 one. What's the date; can you give me the date?

MR. SCHULTZ: Yes, sir. The bill is dated 12/16/75.

THE COURT: 12/16/75?

MR. LASSOFF: That's when we subpoenaed it. The bill is dated, the certified bill.

THE COURT: Okay.

MR. LASSOFF: Your Honor, subject to my finding it--

THE COURT: Let's get it now. He's making a point now of it.

MR. LASSOFF: I can't find it.

THE COURT: All right. Are you ready? Bring the jury in.

H E N R Y D. G I R D W O O D, called as a witness by the defendant in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHULTZ:

THE COURT: Wait a minute.

We have another misspelling here.

MR. SCHULTZ: Yes, sir, I was going to bring that to your attention.

THE COURT: The records will be corrected to show that the defendant's name is spelled G-i-r-d-w-o-o-d.

Go ahead.

MR. SCHULTZ: Thank you, your Honor.

BY MR. SCHULTZ:

Q Mr. Girdwood, would you be good enough to tell the Court and jury, sir, where you reside?

A 268 Ann Davis Avenue in Corning, New Jersey.

Q Sir, would you tell us with whom you reside at that place?

A My wife and children.

Q How many children do you have?

A Four boys.

MR. LASSOFF: If your Honor please, I don't see the relevancy of this testimony.

dh:mg 2 Girdwood-direct

THE COURT: Overruled.

Q Mr. Girdwood, you are one of the defendants in thisaction, are you not?

A Yes, sir.

Q Mr. Girdwood, on or about June 30, 1972, what was your occupation?

A I was a part time bus driver for Domenico Bus Company.

Q Did you have any other occupation at that time?

A Not at that time.

Q Sir, what is your present occupation?

A I'm a truck driver.

Q Sir, could you tell us what kind of trucks you operate now?

A Tractor-trailers.

Q Do you also work now for Domenico Bus Company?

A Yes, I do.

Q On what basis?

A Part time.

Q Sir, in total, how long have you been driving trucks?

A About 20 years.

Q Sir, how long a period of time have you been driving buses?

A About nine years and four or five months.

Q Sir, what kind of a bus was this that you were driving -- withdrawn.

Were you actually driving a bus for Demenico Bus Company on June 30, 1972?

A Yes, I was. It was a General Motors coach.

Q Sir, were you involved in a collision on the entrance ramp or in that area to the Bayonne Bridge on that date?

A Yes, I was.

Q Sir, would you be good enough to tell us what time of the day this occurrence took place?

A Between 6:00 and 6:30 in the evening.

Q Sir, would you tell us further what hours you worked that day for Demenico Bus Company?

A From about 6:00 o'clock in the morning until about 9:00 clock in the morning, and then from 4:00 o'clock in the afternoon until I was delayed that day until after my run.

THE COURT: What would it have been if you completed the run eventually?

THE WITNESS: About a 7:00 o'clock run.

Q On this particular day in question, will you tell the Court and jury, please, where you left from or

what your point of departure was?

A The Port Authority Bus Terminal in New York City.

Q Where was your desination?

A Staten Island.

Q Sir, did you have passengers in this bus?

A Yes, sir.

Q Were any of those passengers injured as a result of this collision?

A None.

Q Now, sir, could you tell us the route that you followed in order to reach the point of the accident?

A I left --

THE COURT: You don't want him to start at the Port Authority, do you?

Can we get a little closer?

MR. SCHULTZ: I can, your Honor. The only reason I did that was for the weather but it is all right.

Q Sir, what were the weather conditions that day?

A Raining.

Q Did there come a time, sir, when-- did the rain continue or did it cease?

A No, it ceased.

Q Could you tell us, sir, were you were when it

ceased raining?

A About approximately a mile from the Bayonne Bridge on Hudson Boulevard.

Q Could you describe the type of rainstorm that it was?

A It had been a very heavy rain.

Q Now, sir, would you tell the Court and jury, please, the width of this entrance ramp that you were on?

A About 25 feet.

Q Sir, could you tell us where you got on to this entrance ramp, please?

A At the very end of Hudson Boulevard, Kenndey Boulevard.

Q In order to get onto the ramp, did you go straight or were you required to make a turn?

A I was reuiqred to make a partial right turn, about a 45 degree angle.

Q Sir, as you went along this entranceway to the Bayonne Bridge, was there a point in time when there was a dip in the roadway?

A Yes, sir, there is.

Q Would you describe, please, for the Court and jury this dip in the roadway? Tell us what it --

THE COURT: I have a problem, Mr. Schultz.

dh:mg 6 Girdwood-direct

The word "ramp" has been used. My conception of the word "ramp" is something that goes up.

Was this really a ramp from the time you left Hudson Boulevard or was it merely a cut-off access road to the ramp itself?

THE WITNESS: It is more of a cut-off access road to the ramp.

THE COURT: But you were not on a ramp at that stage, were you? Now that I have drawn the distinction I was trying to make, where did the ramp start? The rising part to the bridge?

THE WITNESS: At the end of the railroad trestle.

THE COURT: At the end of the-- at the railroad trestle which we have heard about so far?

THE WITNESS: Yes.

THE COURT: You say it would be the beginning of the ramp, the incline portion, no matter how inclined it was, but it would start going up from there?

THE WIT NESS: Yes.

THE COURT: All right.

Q Sir, so it will be more accurate, would you describe this access roadway for us at or near the point where the dip was?

A It is a downgrade approximately 25 degree angle. It is not steep at all -- to under the railroad trestle -- this is the bottom of the dip, and it goes underneath all the tracks and it comes up.

Q How wide is that railroad trestle?

A About ten tracks wide, about 100 foot.

Q Can you give us an estimate as to the width of that trestle?

A About 100 feet.

Q Sir, at the bottom of this dip, I assume it was an area that was relatively level?

A Relatively level, yes.

Q Then, sir, on the other side of the railroad trestle did the roadway continue level or did it go down or up?

A Up.

Q Sir, would you tell this Court and jury what the condition of the roadway was at that dip?

A They were flooded.

Q It was what?

A Flooded.

Q Did this occurrence take place before you reached the dip where you say it was flooded or afterwards?

A Oh, it was flooded.

Q No. Did the accident take place before you reached the dip or after you had gone through it?

A After I had gone through it.

Q In other words, sir, the occurrence took place after you went through the flooded area?

A Yes, sir.

Q Could you tell us, sir, how deep that water was in this dip?

A 6 to 9 inches. 9 inches.

Q Now, sir, how long a distance was this area flooded?

A About 25 feet of flood.

Q Had you driven that area before this time?

A Yes, sir.

Q Had you driven this area on prior occasions when it rained?

A Yes, sir.

Q Will you tell this Court and jury what you observed at that dip underneath the railroad trestle on prior occasions when it rained?

A It was usually flooded.

Q Sir, you drove this route, did you, every day?

A Yes, sir.

Q For how long had you been driving that route?

A About two years.

Q How many days a week did you drive that bus?

A Five days.

Q Sir, after you went through the flooded area under the trestle, could you describe the roadway for us on that day?

A Wet.

Q Was it level or did it go up?

A Inclined up.

Q Could you tell us the degree or the type of inclining going up that there was?

A Very gradual.

Q Was the dip or this area under the trestle, was that the lowest point in the roadway?

A Yes, sir.

Q Was it the point where the two grades emptied into?

A Yes, sir.

Q Now, sir, did you see the vehicle which you later learned to be operated by Mr. Chiarello at any time prior to the accident?

A Yes, sir.

THE COURT: Before we reach that, Mr. Schultz,

how wide was the roadway at this point going from when you left the trestle area to continue on to the bridge?

You told us it was 25 feet wide when you got onto it?

THE WITNESS: When I got onto the approach ramp?

THE COURT: Yes.

THE WITNESS: It is a full two lanes there.

THE COURT: Full two lanes. At the dip?

THE WITNESS: At the dip, yes, sir.

THE COURT: At the dip. And it continued two lanes as you went up the ramp?

THE WITNESS: No, it comes to one lane.

THE COURT: Where is that?

THE WITNESS: At the end -- the beginning incline and a slight turn to the right, to the bridge.

THE COURT: In other words, have you come out from under the trestle yet?

THE WITNESS: Yes, sir.

THE COURT: Is it that point roughly where it becomes one lane?

THE WITNESS: Yes, just about there.

THE COURT: All right.

Q Mr. Girdwood, you told us, I believe you saw the vehicle operated by Mr. Chiarello at some time prior

to the accident, is that correct?

A Yes, sir.

Q So when did you first become aware of Mr. Chiarello's car?

A While I was going down the very first incline.

Q Was that prior to reaching the flooded condition under the trestle?

A Yes, sir.

Q Where was he in relation to your vehicle?

A In front of my vehicle.

Q How far in front of you was he?

A About 75 feet.

Q Did you observe him go through this flooded area?

A Yes, I did.

Q Did you follow him through this flooded area?

A Yes, sir, I did.

Q Sir, were there other cars going in the same direction as you?

A Yes, sir.

Q Other than Mr. Chiarello's car?

A Yes, sir, there was.

Q Was there any cars to your rear?

A Yes, there were.

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Q Would you tell us the position of this car that was to your rear, if you would?

A To my left rear.

Q Where would he be in relation to your bus?

A By my left rear wheel.

Q Was he moving?

A Yes, he was.

Q Now, sir, did you continue to keep Mr.Chiarello's vehicle in view?

A Yes, sir.

Q Was there any other vehicle ahead of Mr. Chiarello's vehicle?

A Yes, there was.

Q How many vehicles were ahead of Mr.Chiarello's vehicle, if you know?

A It was just continuous traffic.

Q Did there come a time, sir, where there was an actual impact between your vehicle and Mr. Chiarello's vehicle?

A Yes, there was.

Q Could you tell us how far that was from the trestle?

A 75 feet, 100 feet.

Q Sir, was there anything in the roadway ahead of

Mr. Chiarello's vehicle?

A Yes, there was another car.

Q And ahead of that,was there any other thing in the roadway, was there any obstruction of any sort?

A There was a merge.

THE COURT: A what?

THE WITNESS: A merge.

THE COURT: What's that?

THE WITNESS: Another roadway coming onto the bridge from an opposite direction.

Q Was there anything else in the roadway?

A Just other vehicles. A puddle.

Q A puddle?

A Yes.

Q How deep would you estimate that that other puddle was?

A 3 or 4 inches.

Q Sir, what did you actually observe with relation to Mr. Chiarello's car and the car ahead of you? What did you see just prior to the impact? What did you see?

A The car ahead of Mr. Chiarello's car stopped and--momentarily, and proceeded--the car ahead of Mr.Chiarello stopped momentarily and then started up again, and then Mr. Chiarello's car stopped.

Q Did you observe any signal lights in these vehicles?

A Yes, I did.

Q By that you mean the brake lights?

A Brake lights.

Q When you saw these vehicles apply their -- saw the signal lights, at least, how far was the front of your vehicle from Mr. Chiarello's car?

A About 75 feet.

Q At that time, had you gone through this puddle?

A Yes, sir.

THE COURT: You mean the trestle dip?

MR. SCHULTZ: Yes, sir.

Q This flooded condition under the trestle?

A Yes.

Q You had gone past there?

A Yes, sir.

Q When you saw these brake lights going on, what did you do?

A I applied my brakes.

Q How far away from Mr. Chiarello's car were you when you put on your brakes?

A About 75 feet, maybe --

Q What --

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A 75, 60.

Q All right.

At what speed were you going?

A At 20 miles an hour.

Q Would you tell us what happened with relation to your vehicle at that point? What happened?

A It started to slide. The wheels locked and the vehicle would not stop on account of the wet roadway.

Q Did your brakes operate properly?

A Yes, they did.

Q Were they wet?

A Yes, they were.

Q From this puddle?

A Yes, sir.

Q Did there come a time when your vehicle came into contact with Mr. Chiarello's car?

A Yes, there was.

Q Could you tell us at what rate of speed your vehicle was going when you came into contact with Mr. Chiarello's car?

A Well, I had slowed down; about 7 or 8 miles an hour.

Q After the impact, sir, did you see Mr. Chiarello?

A Yes, sir.

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Q Would you tell us what you saw Mr. Chiarello do after the impact?

A Get out of his car, walk back towards me, took the keys out of his ignition, opened his trunk, lifted the trunk up to see if he could lock it, closed the trunk again, took the keys out and went back to -he car, I imagine, for his registration.

Q Did you then see him again?

A Yes, sir.

Q When did you see him again?

A He came back out and got into the bus and we exchanged information.

Q During the time that you observed Mr.Chiarello walk out of his car, did he bend down to lift up his trunk?

A Yes, sir.

Q Did you see him bend to get the keys out of his car?

A Yes, sir.

Q Did you see any indication that he was injured that you could observe?

A No, sir.

Q Did he say anything to you about being injured?

A No, sir.

Q When he came back to the bus, did you observe him walking towards the bus?

A Yes, sir.

Q Did you notice anything about him that would indicate that he was injured?

A No, sir.

Q When he got into the bus, did he say anything to you about being injured?

A No, sir.

Q Did police officers come to the scene?

A Yes, sir.

Q Did you hear Mr. Chiarello talk to them?

A Yes, sir.

Q Did you hear him mention anything about injuries to the police officers?

A He said he was all right. They asked if he needed assistance.

Q Was there any damage to the bus?

A No, sir.

Q Did you observe the damage to Mr. Chiarello's car?

A Yes, sir.

Q Would you tell us what you saw, please?

A The bumper was dented, the trunk was dented

and the tail light was broken-- two tail lights were broken. On one the chrome was broken and the other one just the lens was broken.

Q Mr. Girdwood, did you see any damage to the front of his car?

A No, sir, I didn't see it but I seen the water leaking from his radiator.

Q Do you know whether his car came in contact with the vehicle in front of him?

A Yes, sir.

Q You know, but did it?

A Yes, sir.

Q Did you see it come in contact with the vehicle in front of him or not?

A Yes, sir.

Q Did you remain at the scene until Mr. Chiarello's car was removed or did you go on your way?

A No, I remained at the scene.

Q How did his car leave the scene of the occurrence; do you know?

A He drove it and it was pushed to the other side of the bridge by the Port Authority police.

Q Was he in the car while it was being pushed?

A Yes, sir.

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Q Was it pushed with one of those vehicles that have the bumpers or tire bumpers in the front?

A Yes, sir, but it was a regular police car with those bumpers on the front.

Q Pushing?

A Yes, sir.

Q It was not a truck?

A No, sir.

Q A car?

A A car.

Q Pushing it?

A Yes, sir.

Q I assume that the car on occasion-- did it bang into the rear--

MR. LASSOFF: Your Honor, may we have the witness stop being led at this point?

MR. SCHULTZ: I will withdraw it, Judge. He may be right.

Q What did you observe the police car do when he was pushing this car?

A Get behind him and push him.

Q Was there any intermittent pushing, do you know, did you observe?

A I didn't see that.

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Q Mr. Girdwood, you were in my office yesterday, were you not, sir?

A Yes, sir.

Q Yesterday afternoon?

A Yes, sir.

Q I assume that you met me when--about when I got back from court, it was around five o'clock or so?

A Yes, it was.

Q And you were asleep, were you not, on my couch?

A Yes, sir.

Q Did we discuss this case yesterday afternoon or so or did I tell you something?

A Yes, sir.

Q What did I tell you yesterday afternoon when I got back?

A To be here tomorrow and to tell the truth.

Q All right.

Did I discuss this case with you this morning before we came to court?

A Yes, sir.

Q And that's the sum and substance of what has transpired so far, is that correct, sir?

A Yes, sir.

MR. SCHULTZ: Excuse me one minute, your Honor,

I want to consult with my partner.

I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. LASSOFF:

Q Mr. Girdwood, when you went to Mr. Schultz' office, did he give you a copy of your deposition to read?

A Yes, sir.

Q And that was the deposition that was taken about a year and a half ago in this building, where I questioned you?

A Yes.

Q How fast was your motor vehicle going prior to reaching the railroad trestle and the dip underneath the railroad trestle?

A It was about the same speed as the rest of the traffic, about 25 miles an hour, 25, 30 miles an hour.

THE COURT: How much?

THE WITNESS: 25 to 30 miles per hour.

Q Now, where, if any place, prior to your seeing Mr. Chiarello's car and the cars in front, their brake lights going on, did you reduce your speed?

A I reduced my speed going down the ramp before we got to the puddle.

Q And why was that?

A Because I could see-- I knew the puddle would be ahead.

Q So that you knew the puddle was there and you knew that the water was deep?

A Yes, sir.

Q On this bus, how high off the ground are the brake controls?

A The brake controls? They are at my feet.

Q I mean the brakes themselves, not the brake you push, the brakes that lock the wheels.

A The thickness of a tire.

Q The thickness of a tire; does that mean the height or the width?

A The height.

Q The height of the tire. And on that bus approximately how high is a tire?

A About 9, 12 inches.

Q You are saying this circumference or not the whole width of the tire?

A Not the whole width, of course not.

Q All right. When you went through a puddle, did you know before you went into the puddle that the slower the speed that you went through the puddle, the less water you would splash?

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MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A No.

Q You didn't know that?

A No, because no matter how you go through, if you go through fast or if you go through slow, you still get water on the drums.

Q But it is a fact, is it not, that you throw up more water going through a puddle at a higher speed rather than a lower speed?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Where?

MR. LASSOFF: To the side and upward. I think it is a fact of science.

THE COURT: I don't know any such fact of science.

Q When you go through a puddle at a high speed, of water--

MR. SCHULTZ: Objection.

THE COUT: There may be a better way to go through for all I know, Mr. Lassoff.

I sustain the objection.

Q When you went down into this dip, could you see traffic in front of you at all times?

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A Yes, sir.

Q When you came out of the dip, could you see traffic in front of you at all times?

A Yes, sir.

Q I show you Plaintiff's Exhibit No. 1 for identification and ask you if that fairly and accurately represents the railroad trestle as it exited at the time of this accident?

A Yes, sir.

Q Is that the photograph of the railroad trestle looking fack from the place where the accident happened towards the railroad trestle?

A Yes, sir.

Q Is the place where the accident happened shown in that picture or did it occur still further back from the railroad trestle?

THE COURT: Further ahead.

MR. LASSOFF: Further ahead, excuse me.

A No, sir, it is in the picture, yhe area.

Q Would you show us where in the picture that is, please?

A Just --

MR. SCHULTZ: He should mark it, your Honor. Showing him is not going to do it.

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THE COURT: Yes. Put a dot.

Q At the place where the accident happened, had you passed a bus stop alongside this roadway where passengers would wait for the bus?

A Yes, sir.

Q So you already passed that bus stop, is that correct?

A Yes, sir.

Q I show you this photograph and ask you if it fairly and accurately represents the location and the bus stop as it appeared at the time of the accident?

A Yes, it is.

Q Is this photograph taken facing from the trestle up towards the bridge?

A Yes, it is.

Q Can you show me where on this photograph the accident happened?

A Yes, sir.

Q Would you do so, please, with a circle again?

A May I have the pen?

Q I'm sorry. I did take it away.

Q I show you this photograph and ask you if you could show me on that photograph the place where the accident happened.

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MR. SCHULTZ: Can we have that exhibit number, please?

MR. LASSOFF: That's 3, I believe.

A Just about here.

Q Just about there?

A Yes, sir.

Q At the point where that street light is shown in that photograph is there an access road of some kind to the bridge?

A No, it is beyond t'at.

Q It is beyond that?

A Yes.

Q OK.

Can you show me on Plaintiff's Exhibit 1 where this bus stop is?

A No, the bus stop is not visible here.

Q The bus stop is not visible?

A Behind those billboards.

MR. SCHULTZ: I didn't hear that.

A It is behind the billboards on that photograph.

Q I show you this photograph looking towards the bridge and ask you if this photograph fairly and accurately represents the roadway leading to the bridge as it existed on June 30, 1972?

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A Yes, it does.

Q At the top of this photograph, can you see the bridge, up over here?

A The bridge is up here.

Q So this is a ramp --

MR. SCHULTZ: We can't hear, Mr. Girdwood, please.

A Yes.

Q So this is a ramp to the bridge over here?

A Yes.

Q And this is where the actual ramp to the bridge starts?

A Yes, this is the access.

MR. SCHULTZ: If your Honor please, I don't think this is doing anybody any good.

THE COURT: There's a private conversation going on between you, Mr. Lassoff, and the witness, and nobody can hear including me.

Q Would you mark where the actual ramp to the bridge starts on that photograph, Mr. Girdwood?

MR. SCHULTZ: Could we have that exhibit number, sir?

MR. LASSOFF: It is not in evidence yet.

THE COURT: I don't know what you mean by

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"actual ramp."

Q Is this road over here that the accident happened on an access road?

A Yes, sir.

MR. SCHULTZ: If your Honor please, at this time I'm going to object unless this picture is in evidence.

THE COURT: We can mark it for identification.

MR. SCHULTZ: Or whatever he wants to do. At some point I think it should be marked.

xx (Plaintiff's Exhibit 13 marked for identification)

MR. LASSOFF: I will offer it in evidence, your Honor.

MR. SCHULTZ: I didn't hear you ask him if that accurately portrays the scene.

MR. LASSOFF: I did and he said yes.

THE COURT: I didn't hear it.

You had a conversation going on up here, your back was to the jury, they didn't hear what you were saying, I didn't hear what you were saying.

Q Mr. Girdwood, I ask you if the photograph that I just showed you, this particular photograph, accurately portrays --

dh:mg 29 Girdwood-cross

THE COURT: When you say "this particular photograph," that record will not know what you have in your hand unless you tell the reporter what it is.

Q This particular photograph, Plaintiff's Exhibit 13 for identification, fairly and accurately depicts the roadway leading towards the Bayonne Bridge as it existed on June 30, 1972?

A Yes, it does.

MR. LASSOFF: I offer it in evidence.

MR. SCHULTZ: No objection, your Honor.

xx (Plaintiff's Exhibit 13 received in evidence)

Q Would you mark with that pen where the actual ramp to the bridge starts?

THE COURT: I don't know what you mean by "actual ramp."

A Well, there are several actual ramps to the bridge. This one and the one from the other side, from another street.

Q The actual ramp for the road you were traveling on.

A It is before this picture.

Q Before this picture?

A Yes.

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Q I see.

Is this an access road that you were traveling on at the time the accident happened?

THE COURT: I don't know --

A I can't define an access road, it is part of the bridge roadway.

THE COURT: He said after you leave the trestle the road starts its upward elevation to the bridge.

That's why I keep asking what you mean by "actual ramp."

I gather from this witness the rise from normal level up to the bridge started right beyond the trestle.

THE WITNESS: Yes, sir.

THE COURT: From then on the elevation goes up.

Now, where you say the point of actual ramp is, I don't know.

Q May I ask you to mark with a circle on this photograph the place where the accident happened, if you can do so, if it is shown on the photograph?

A Right there.

Q At the point where you have put a circle, isn't there a lowering of the roadbed and a slight decline?

A Yes, sir.

Q So that at that point the road doesn't go up, it goes down slightly?

A Yes, sir.

Q Thank you.

You are a professional driver, correct?

A Yes, sir.

Q You have driven for a living for 20 years?

A Yes, sir.

Q At the time of this accident, you were fully aware of the effects of rain and weather on brakes, were you not?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, sir.

Q It was part of your job to be aware of that, wasn't it?

A Yes, sir.

Q As a matter of fact, as an employee of Domenico Bus Service, do they give you certain instructions with regard to safety in operating buses in difficult weather conditions?

A Yes, sir, they do.

Q What are the instructions or what were the instructions as of June 30, 1972?

A Not following close.

Q Not following close?

A Yes, sir.

Q Sir, when you came out of this ramp, what speed were you going at?

MR. SCHULTZ: Objection, I don'tknow what he means.

MR. LASSOFF: I withdraw it.

Q When you came out of the dip, what speed were you going at?

A About the same speed I ended at,about 20 miles an hour.

Q As a professional driver, do you know how much distance your bus would cover driving at a speed of 20 miles an hour in one second?

A About 20 feet a second.

Q Would you accept 1-1/2 feet per second as a mathematical formula so that you would be covering 30 feet per second?

A Yes, sir.

Q So that when you got out of that ramp, how close was the closest car in front of you?

THE COURT: What is it now? You traveled 30 feet a second?

A No, sir.

MR. LASSOFF: That's a mathematical formula.

THE COURT: What is a mathematical formula, Mr. Lassoff?

MR. LASSOFF: That a moving vehicle operating at a speed covers 1-1/2 feet per second for each mile of speed.

THE COURT: So you say he is going 3 feet a second?

MR. LASSOFF: 30 feet a second at 20 miles an hour.

THE COURT: All right.

Q When you got out of the dip, how far in front of you was the closest car?

A About 75 feet.

Q How long did it take-- withdrawn.

Before you got out of the dip, did you see the brake lights of the car in front of you?

A No, sir.

Q Did anything block your view of the brake lights of the car in front of you?

A There is a bend in the road.

Q Can you show me a bend in the road in any of these four photographs that are in evidence?

A Yes, sir. This one. From here. From back here --

MR. SCHULTZ: I think it should be marked, your Honor.

MR. LASSOFF: That's Plaintiff's Exhibit 1.

MR. SCHULTZ: But can he mark it? Just talking about it and not marking it does not do any good, your Honor.

A The angle of the bridge is off to the left here. It doesn't - - you are looking at it -- by looking at this picture, one would think that the bridge is straight ahead this way, but actually the bridge at this particular part in the photograph is off to the left.

Q Coming out of that dip, coming out of the incline, is there anything that blocks your view of the entire road?

A No, sir.

Q So that that bend does not affect your vision of the cars in front of you?

A Not unless they are far enough ahead of you.

Q And the car 75 feet in front of you would not be far enough ahead of you to block your vision?

A Yes, it would, at times.

Q It would?

A Yes.

MR. LASSOFF: May I show it to the jury?

THE COURT: No, I want him to indicate a bend.

Q All right. Indicate a bend, if you would, in this picture.

THE COURT: Use a "B" --

THE WITNESS: Right here.

Q Put a "B" on top of that mark, please.

(Handing to the jury)

MR. LASSOFF: Should I proceed or wait?

THE COURT: You might as well wait. I want the jury to listen to his testimony.

MR. LASSOFF: All right.

THE COURT: You may proceed.

Q You have come out of the dip going at a speed of about 20 miles an hour, and you see the brake lights of Mr. Chiarello's car go on.

Going at that speed,how much time would it take to stop your bus?

MR. SCHULTZ: Time?

MR. LASSOFF: Time.

MR. SCHULTZ: Objection, your Honor.

A I have no idea.

THE COURT: Overruled.

Q You have no idea?

A Time,no. Not timewise. It would be a matter of seconds.

Q A matter of seconds?

A Yes.

Q When you came out of that dip and were driving and saw Mr. Chiarello's brake lights come on, you had to take your foot off the accelerator or gas pedal and change it to the brake, did you not?

A Yes, sir.

Q Did that take time?

A Yes, sir.

Q About how long did that take?

A I have no idea, sir. A second, a fraction of a second.

Q At the point where the accident occurred and the point where you applied your brake, this roadway was one car wide, correct?

A Yes, sir.

Q Did you at any time, from the time you applied your brake until your bus struck Mr. Chiarello's car, change directions in any way?

A Yes, sir, I tried to steer into the curb.

Q Did you hit him straight on?

A I -- the rear wheels hit the curb on the curve.

Q Let's change it to feet this time, sir.

How many feet would it have taken you to stop your bus under the conditions that were in existence at the time of this accident?

THE COURT: According to your figures, 60 feet.

MR. LASSOFF: He didn't stop the bus, your Honor.

THE WITNESS: About --

THE COURT: You gave him a hypothetical and the answer to your hypothetical is 60 feet on your science figures, you told me. You asked him a hypothetical, didn't you?

MR. LASSOFF: No, I'm asking a direct question.

THE COURT: The question you put --

Q Going at a --

MR. LASSOFF: I withdraw the question.

THE COURT: Going at a speed of 20 miles an hour, how long would it take him to stop his bus?

MR. LASSOFF: Under the weather conditions that were existent at that time.

THE COURT: You have given the answer to the Court and jury. 60 feet.

MR. LASSOFF: All right.

Q If there were perfect weather conditions --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

Q -- and the road was not wet, how many feet would you have to cover going at 20 miles an hour before you brought your bus to a stop?

MR. SCHULTZ: Objection, your Honor, that is not relevant. The conditions are what was there then.

THE COURT: I will take it.

A I'd say about 50, 60 feet.

Q At regular weather conditions?

A Yes, sir.

Q Does the fact that the roads are wet and flooded increase or decrease the distance that a car would travel before you could stop?

A That depends on the weather conditions.

Q Assuming the weather conditions as of this day, the time of this accident, would it make it a shorter stop or a longer stop?

A It made it a longer stop.

Q Under thos weather conditions how many feet did you need to bring your car to a stop going at 20 miles an hour?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A About -- he thought about 60 feet.

Q You just said it was 60 feet. There was no change between perfect weather --

A I assume it would take about 60 feet. Because most times your wheels will grab.

Q What I want to know from you is: Can you stop your car in a shorter distance on a dry roadway than on a wet roadway?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, you can stop your car.

Q You said it would take you 60 feet to stop the bus on a dry road.

THE COURT: No, he said 50 to 60 feet.

Q 50 to 60 feet on a dry road?

A Yes, sir.

Q I want to know on a wet, flooded roadway, how long would it take you to stop that bus, how many feet?

A Say 70.

Q 70?

When you first applied your brakes, you were 60 to 75 feet behind this car?

MR. SCHULTZ: 75 is what he said, Mr. Lassoff.

THE COURT: 75.

Q So that you were 75 feet?

A Yes, sir.

Q Was that at the time your foot was on the accelerator or when it was on the brake?

A I don't remember where my foot would be exactly at 75 feet, no, sir; I don't remember.

Q At the time you first saw the brake lights, your foot would still be on the accelerator?

MR. SCHULTZ: Objection, your Honor.

A Yes, sir.

Q So that some period of time had to transpire while you took your foot from the gas pedal and put it on the brake, correct?

A Yes.

THE COURT: He has already said a fraction of a second.

Q At that time did you also see the brake lights go on on the car in front of Mr. Chiarello?

A Yes, sir.

Q And in front of that car was there another car?

A Yes, sir.

Q What was that car doing at that time?

A Slowing down.

Q For what reason?

A To allow vehicles to merge from another direction.

Q Was there a car that was proceeding slowly throughout the puddle at the time this accident happened?

A Yes.

Q Is that the car you are talking about or is that still another car?

A No, that would be the same car.

Q At the time the accident happened, had that third vehicle gone through the puddle or was it still in the puddle?

A It had gone through the puddle.

Q When your bus struck Mr. Chiarello's car, how far did your bus move after the impact?

A After impact?

Q After impact.

A About two, three feet.

Q How far did Mr. Chiarello's car move after the impact?

A About 10 feet.

Q Did something bring Mr. Chiarello's car to a stop at that place?

A Yes, sir.

Q What was that?

A The vehicle in front of him.

Q Struck the vehicle in front of him?

A Yes, sir.

Q At the time your bus hit Mr. Chiarello's car, was Mr. Chiarello's car moving?

A No, sir.

Q How long had he been stopped?

A Just for a second.

Q When you drive a car-- I withdraw the question.

It is part of your job to cross this Bayonne Bridge several times each day, is it not?

A Yes, sir.

Q And you are fully familiar with the fact that on the roadway leading to said bridge there are places where water collects?

A Yes, sir.

Q Incidentally, in that dip underneath that railroad trestle, aren't there sewer lines and drains?

A Yes, sir, that's where it floods. The sewers get clogged up.

Q And there are no sewer lines or drains along the rest of the roadway,are there?

A No, sir.

Q So that when you were operating your bus you

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knew it was quite likely that your bus would go through pools of water?

A Yes, sir.

Q Did you also know it was quite likely that those pools of water might affect your brakes?

A Yes, sir.

Q Did you take any precautions with regard to going through pools of water with the operation of the speed of your vehicle?

MR. SCHULTZ: Objection, your Honor.

THE COURT: He has already answered that. Go ahead. Next question.

Q When you saw Mr. Chiarello after the accident, how did he appear to be to you?

A Shaken.

Q What does "shaken" mean?

A White.

Q White?

A Yes.

Q He didn't appear to be strutting around in full glory, did he?

MR. SCHULTZ: Objection, your Honor.

A I did not hear you.

THE COURT: Sustained. When your counsel says

"Objection," don't answer until I rule on the objection.

THE WITNESS: I said I couldn't hear, sir.

THE COURT: He couldn't hear you but I sustained the objection anyhow.

Q After this accident -- I withdraw the question.

Incidentally, was it the Port Authority that pushed Mr. Chiarello's car to the other side of the bridge?

A Yes, sir.

Q What kind of a vehicle is that?

A It was a police car with rubber bumpers.

Q Rubber bumpers?

A Yes, sir.

Q I see.

After the accident, did you speak to Mr. Chiarello at any time?

A Yes, sir.

Q What did you say to him?

A First of all, I asked him if he was hurt, and asked him for his registration and license.

Q Did you say to him, "I am sorry"?

A Yes, sir.

MR. IASSOFF: No further questions.

MR. SCHULTZ: No questions, your Honor.

THE COURT: You may step down.

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(Witness excused)

THE COURT: Next witness.

MR. SCHULTZ: If your Honor please, I have two doctors here. One doctor just came up from Florida this morning. As a matter of fact, he just got here.

Could I have about five minutes to talk to him? Judge, he just got off the plane.

THE COURT: We will have a short recess.

(Recess)

(Jury present.)

MR. SCHULTZ: Take the stand, please.

D U K E B A R N E T T B A I R D, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHULTZ:

Q Dr. Baird, would you be good enough to tell us, sir, what your address is?

A Yes, sir. I have my office at 2825 East Fourth Avenue in Hialeah, Florida, that's just outside of Miami.

Q Sir, do you practice medicine from that address?

A Yes, sir.

Q Sir, are you a licensed physician and surgeon in the state of Florida?

A Yes, sir, I am.

Q Sir, would you be good enough to tell us your hospital connections, if any, at Florida, in Florida?

A Yes, sir, I'm currently practicing at Hialeah Hospital which is near my office and Parmalee, a hospital outside of Hialeah.

Q Would you be good enough to give us your educational background?

A I had my premedical training at the University of Mississippi; four years of medical college at the University

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of Alabama. I graduated at 1949. I had a year of internship at the National Naval Medical Center, Bethesda. A year at Lloyd Nolan Hospital at Birmingham, Alabama. I then had two years in the service, in the army and air force, primarily in orthopedic surgery.

I then had three years of training at the Columbia Presbyterian Center, New York city, in orthopedic surgery.

I then went to Florida and started practicing in 1957, restricted my practice to orthopedic surgery and I'm still there.

Q Sir, do you have any additional degrees or designations, such as that of a diplomate?

A Yes, sir, a fellow of the American College of Surgeons, also a fellow of the American Academy of Orthopedic Surgeons, and a diplomate of the American Board of Orthopedic Surgeons.

Q Sir, would you tell us how one becomes a diplomate in the American Board of Orthpedic Surgeons?

A Yes, sir, at the time that I took the examination, which is in 1959, it was in two parts. Part one is written and oral. After you have successfully completed that, you're in practice for two years, restricting your practice to orthopedic surgery. You are eligible for part two, which is written, given by other orthopedic surgeons in the country.

If you successfully completed that, you are appointed as a diplomate of the American Board of Orthopedic Surgeons and I did this in 1959.

Q Doctor, did you have any connection with me whatsoever, prior to today?

A No, sir, this is the first I've met you.

Q Sir, did there come a time in February of 1975 when you were asked by a representative of the Domenico Bus Service to examine Mr. Thomas Chiarello?

A Yes, sir.

Q Sir, would you tell us the date that you examined him and where you examined him?

A I examined him at my office on February 5th of '75, almost a year ago.

Q Sir, would you be good enough to tell us the method of examination that you conducted and your findings and please go slowly so that the court reporter can take it, the Court and the jury understand it, sir. Would you please?

A Basically, what I do is I take a history of the patient, the onset of the patient's illness, the progress of his course through the--throughout this course of illness until the time I see him.

Then I find what his present symptoms are. Then I go into what his past medical history was in relation to this

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particular area. Then I do a physical examination; and then I obtain x-rays of the region we're talking about, and then formulate an opinion.

On the day I saw him, February 5th of '75, he gave me a history of being in an accident on the 30th of June of '72.

Q Doctor, would you please just give us the examination that you conducted.

A Right.

Q And your findings.

A Do you want any of his complaints?

Q If they are necessary for you to render your opinion, sir.

A I went through his history. I also had available prior medical reports and prior hospital reports on the patient, and prior orthopedic reports.

At the time I saw him he was still being followed by Dr. Leone, and he was taking Valium and Elavil and also he took Percodan for about three weeks and then he was taking Fiorinal.

I asked him what his present symptoms were and he said that he was having occipital headaches, this is in the back of the head, coming on about two or three times a week, going up from the back of the head over the top of the head to the forehead, lasting anywhere from fifteen minutes to two hours.

He also said he had a soreness in his neck, both when he was sitting at rest, and that he had no discomfort with motion of his neck, but when he turned his neck rapidly, or turned it to the extremes, he would have neck discomfort.

I asked if he had any pain in his arms and he said he did not, but that his right arm generally felt weak.

I asked him then in reference to his back if he was having any further problems with his back and to quote him he said, "About all the time."

He said sometimes these get quite severe and he estimated approximately 50 to 75 percent of the time there was severe symptoms in his back.

He had no actual pain in the right leg but he said he felt a deadness in his right leg. Also he felt his right leg would occasionally give way from time to time.

I asked him if moving his back, just moving it without any stress, would cause pain and he said that it would.

I took a past medical history. He said he had had no prior injuries or symptoms or treatments or x-rays on his back or his neck before the accident in '72.

And that his only prior hospitalization had been for a tonsilectomy and for an appendectomy.

I then examined the patient. For the examination he undressed and a long gown, which is open down the back, is

applied, is worn by the patient.

I stand behind him and during the history taking you are actually observing the patient and this is part of your examination.

THE COURT: You're talking too fast, doctor. I don't think the members of the jury are getting everything you say.

Q And speak up a little louder and slower, doctor, please.

A All right.

I checked and he was a slightly obese, 38 year old man who is using a cane in his right hand. He had a well healed scar in the lower back, in the middle. I examined his neck. He had a full range of neck motion.

When I do this, I put my right hand on top of his head and my left hand on his neck to feel the muscles while they're going through the motion.

Q Doctor, can I interrupt you?

A Yes, sir.

Q Sir, you say that you examined his neck and did you say you found a full range of motion?

A Yes, sir.

Q Would you tell the Court and jury, please, what that means?

A Yes. In other words, I take them through a range of motion of bringing the head all the way down in flexion, all the way in extension, turning to the right, turning to the left, tilting to the right, tilting to the left, and then circumduction or carrying it around in a circle.

All of these motions were full.

He complained of discomfort on the right side of his neck with bending it forward and with turning it to the left. He said he had no discomfort with extending his head backward or turning it to the right. Nor did he have any discomfort with circumduction or carrying it around in a circle. He had no spasm or tenseness of the neck muscles when he was standing at rest or during the motions of his neck.

Q Sir, would you tell us what the significance is, please, of the absence of a spasm in and about the neck area, as you have described it?

A Yes, sir. Spasm to me is an involuntary tensing of the musculature in the presence of a significant degree of pain. The body tries to protect that joint by putting the muscles on both sides of the joint into a spasm. The lack of spasm would indicate that there's no significant degree of pain in that region.

Q Sir, after examining his neck and observing that there was no splinting and no spasms, what was your conclusion,

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sir, with relation to his neck area?

A My eventual conclusion in reference to his neck, he had no current disability to the neck on an orthopedic basis.

In other words, orthopedics, which is my specialty, is the treatment of the bones and the joints of the body and their related structures, the ligaments, tendons, muscles and nerves. In respect to his neck, I found no permanent disability.

Q In other words, in February of 1975, you found no permanent disability in and about the area of his neck, including his cervical vertebrae, the surrounding ligaments, the surrounding nerves and muscles; is that correct?

A That's correct.

Q All right, sir. Now, would you be good enough to continue with your examination or tell us what else you did?

A That part of the neck examination is, I carry his shoulders through a full range of motion, I raise them overhead, which is abduction, externally rotate, bend them all the way out and in. He had full motion of both shoulders, there was no restriction of motion of the shoulders and there is no pain on motion of the shoulders.

I then did a neuralogical examination.

Q Wait a minute, sir, before you go any further.

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So now with relation to his shoulders, what was your ultimate conclusion with relation to the bones which formed the shoulder joints and the ligaments and muscles in and about that area?

A There were no complaints and no abnormalities in the shoulder regions.

Q Would you continue.

A I then did a neurological examination of the arms. He had sluggish reflexes but his reflexes were equal on both sides. In other words, with equal reflexion on both sides, some people are more tense than others or have very hyperactive reflexes, but the primary problem in reflexes is the equality with both sides.

His reflexes were equal. There was no change of any of the reflexes, the biceps and the triceps and the flexor carpi radialis, which is one back here, one here and one down here. I then checked the--

Q Wait a minute, doctor, before you go to that. So, with relation to the neurological examination of his arms, which is the biceps and the triceps and the movement there, did you find any neurological involvement whatsoever?

A Well, I had not finished with the neurological examination. I further checked out the power of the muscles supplied by the three primary nerves of the forearm, the radial

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nerve, ulnar nerve and median nerve. There was no atrophy, there was no muscle weakness or disfunction that I could determine.

The reflexes, as I say, were normal. I found no neurological deficits of the arms or the upper extremities.

Q All right, sir.

What else did you do, sir?

A I then checked his low back area. On this particular examination I stand behind the patient, and I have them bend forward and bend backwards and tilt to the right and tilt to the left while I can observe the function of the back throughout these various motions.

On bending forward, the patient voluntarily limited his flexion to about 50 percent of normal.

Q What do you mean by that, sir, what he voluntarily?

A I can show you. In other words, on a normal bending, a person can normally bend over approximately 90 degrees. On his bending, he bent over approximately 50 percent of that, and what I mean on voluntarily is that it was my opinion that there was no muscle spasm or pain that was limiting his motion, that the patient would just bend that far and say that's all I can bend, but actually there was no--nothing that I could see in my examination as to why he would be limited to that range of motion.

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In fact, he had full motion in bending backward and in bending to the right and to the left.

Q Doctor, you say that you found no muscle spasm in and about the lumbar area?

A That's correct.

Q And doctor, what does that signify to you, the absence of muscle spasm?

A Again, it would indicate that the patient has no significant degree of pain in the back during these particular motions.

In fact, he complained of discomfort on bending forward and on bending to the right and on bending backward and no discomfort on bending to the left side.

Q Sir, did you say that with relation to bending to either side and backwards, did you see any restriction there?

A No, his motion in those particular ranges were full.

Q Now, sir, were you able to determine, as a doctor with reasonable medical certainty, any reason why he couldn't bend forward more than he did?

A No.

Q All right, sir.

A I then examined the lower extremities and--

Q Would you tell us what you mean by the lower extremities, please?

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A His legs.

Q His legs?

A His legs, right.

Q All right.

A And checking as to the muscle power, he had no atrophy of the calves or of the--just above the calf in the supracondylar region of the thighs. I measured those areas, he was 16 inches both calves, 17 and one quarter inches in both supracondylar regions.

Q Excuse me, doctor, when you tell us there was no atrophy and that the calves measured equally, both on the right and the left, is that correct?

A That's correct.

Q What does that signify or what does that indicate to you as a diplomate in the field of orthopedics?

A Well, there's two things, really, that could cause a muscle wasting or a muscle atrophy. One thing would be a favoring of that side or a disuse of that side. Another thing that could cause a muscle wasting or an atrophy could be an actual disfunction of the nerve supplying the muscles in the area where the muscle wasting is. With the absence of any atrophy, muscle wasting would be, in my opinion--that there is no evidence of any nerve disfunction or favoring of one side over the other side.

Q So, doctor, in this particular instance you did not find any wasting; is that correct?

A Yes, sir.

Q And you found no atrophy?

A Yes, sir.

Q Which indicated to you, I assume, then, that there was no neurological deficit or involvement in his calf muscles or thigh muscles?

A That's correct.

Q Would it also indicate to you, doctor, that his calves and thighs were being used equally, both right and left?

A Yes, it would indicate this to me.

Q Sir, if he did not use them, you would say there would be some difference in measurement?

A If he favored one over the other, yes, I would expect to see a difference in measurement, particularly in the calf.

Q And you found no difference?

A No.

Q All right, doctor. Would you please continue.

A I checked the foot, the muscles that pull the feet up and the muscles that put the large toe up, the long extensors, and these I could determine no difference between the power on either side.

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I checked his reflexes. His ankle jerks and his knee jerks were again sluggish but they were equal on both sides. I also checked the escalation to the foot. The pulses at the ankle and the foot were equal, and normal on both sides with each other. The color and the temperature of the feet was equal on both sides.

Q Doctor, before you go any further now, you told us--I think you told us, anyway--that you did knee jerks, did you?

A Yes, sir.

Q And did you find them equal on both sides?

A Yes, sir.

Q And did you tell us that they were sluggish on both sides?

A That's correct.

Q What does that indicate to you, sir?

A That there's equal function on both sides to the muscles at that level, which would be approximately 3, 4, lumbar 3, 4.

Q Did you also do ankle jerks?

A Yes, sir.

Q I assume that there's a posterior ankle jerk, is there?

A The ankle jerk is an Achilles' tendon reflex, one of the other names for it. There's a posttibial tendon

reflex, which is a different reflex.

Q Sir, would you tell the Court and jury how one performs these reflexes, doctor, or how did you do it on this man, let's do it that way.

A Right. When I did it on him, I first had him sitting on the side of the examining table, and I sit down in a chair and he's about this level to me, and I check-- I have a rubber hammer, I check his knee reflexes and his foot and ankle reflexes, in that position, and then with the--later with the patient like face up on the table, while I'm performing other tests with the legs, one of which is called a Favre's test, where you put your heel on the opposite knee, actually you're checking on that particular test, the hip function, but it's a good point where you can check again the ankle reflexes to see if they're equal on both sides.

Then later, as I'm checking the patient with the patient face down on the table, at this point I'm usually looking for tenderness but in this position you can also bend the patient's knee and again check your ankle jerks and posterior tibial reflexes, and in the three instances that appeared to be equal on both sides with each other, the ankle jerks.

Q Doctor, what was the significance of the fact that they were equal on both sides? What is the significance

to you, sir?

A To me they would signify no disfunction of the nerves to the particular reflexes, which is the L-4, 5 level or L-5 root.

Q Doctor, the nerves that supply that particular area that we're now talking about, they emanate from the L-4 and L-5 area, do they not?

A Yes.

Q Sir, was that the operative site where this man had had an operation?

A Yes, he had an operation at that site.

Q What site do you say--do you recognize the operative area to have been?

A From the records, a review of the records, he had an exploration at L-3, 4, the site above that, on the right side. And had an excision of a disc at L-4, 5, and then he later had some different surgery at that level, too.

Q Doctor, with relation to the nerve that emanates between L-4 and L-5, where there was this hemi-laminectomy; is that correct, sir?

A Laminectomy.

Q Laminectomy, all right, sir.

Does the nerve that emanates from the scene or the sight of that hemi-laminectomy, does that control the area that you're

now talking about you tested?

THE COURT: You mean just ankle jerks and knee jerks?

MR. SCHULTZ: Yes, sir.

A It doesn't control the knee jerks, it controls the ankle jerks.

Q And you found that these ankle jerks were equal; is that correct, sir?

A Yes.

Q Does that indicate to you that there was at that point no nerve involvement?

MR. LASSOFF: Objection.

MR. SCHULTZ: Withdrawn.

Q What does it indicate to you?

A That would indicate to me that there's no disfunction of the nerves from that level.

Then I proceeded with the patient, as I say, lying face down to see if he had any localizing tenderness. He was tender from about--he had a scar, as I say, on the back from a prior operation; from about an inch and a half above the top of the scar to about--which was about L-2, down to the mid sacral region. He also complained of tenderness over the right iliac crest and the right buttock. I will have to show you, you feel in the back the bone comes out over here, a lot of

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people call that the hip bone, it's the pelvic crest. He complained of tenderness over there and over the entire right buttocks.

That was the end of the examination, other than the x-ray examination.

Q Doctor, you told us that you examined some x-rays. What x-rays did you examine?

A I took x-rays of the patient in my office on that examination.

Q All right, sir. Do you have those x-rays with you?

A Yes, sir, I do.

Q Could we see them, please?

A You want the folder?

Q The x-rays themselves. Before we do that, doctor, you had these x-rays taken of this patient in your office, did you?

A Yes, sir, I did.

Q Are these the x-rays that you took under your-- were they taken under your supervision, sir?

A Yes, I did not take them but they were taken under my supervision.

Q By an x-ray technician within your office?

A That's correct.

Q Sir, are those the x-rays that were taken in your

office that you have there with you today?

A Yes, sir, they are.

MR. SCHULTZ: I offer them in evidence, your Honor.

MR. LASSOFF: No objection.

xxxx (Defendant's Exhibit B is marked in evidence.)

A I have a folder to keep them all together.

Q It's just I want you to put the ones out.

THE COURT: Do you want all the x-rays in or only certain ones?

Q Do you want to select certain ones that you want to use today, doctor, to describe this condition or do you want to put them all in or what?

A It doesn't matter. Why not put them all in and keep them all together. That way they won't get some here and some there.

THE COURT: All right.

MR. SCHULTZ: That's Defendant's Exhibit B, is it?

THE CLERK: Received in evidence.

Q Doctor, would you select whatever x-rays you want to and put them in the shadow box and explain to us, to the Court and jury, what you saw?

A This is the--I took five x-rays of the neck, of the cervical spine. This is an oblique view which primarily just shows the foramina or holes through which the nerve from

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the neck emanating down to the shoulder and down to the arm.

These are normal throughout all of the neck x-rays. This is one oblique--

Q Excuse me, doctor, leave that in there, would you please? Doctor, is that a normal cervical spine that you see there?

A Well, this really doesn't tell that much. It's an oblique view. There's a side view would show you more information.

Q What you see there in that oblique view, does that indicate a normal spine to you?

A Yes--

MR. LASSOFF: Objection, your Honor, these x-rays don't tell him that much, he said.

Q What does that x-ray indicate to you in that oblique view?

A There is no positive findings on this. This is a normal film of the oblique view.

Q All right.

A This is the other left oblique. Again, it depicts your foramina, there's no encroachment, no evidence of any fracture or subluxation. Again, I would call that a normal x-ray. That's a lumbar.

This is--I take two films of the side view of the neck.

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This is a film with the patient bending his head backwards and perhaps I can get the other one up at the same time.

Anyway, this is with the patient bending his head forward in a side view, and what I do on these two, I'm trying to determine that there's no stiffness of the neck, particularly at any particular level, and that the motion of the neck on both the extension film, the bending film, is normal. Also this would show me if there's any narrowing of any of the disc spaces between any of the vertebral bodies. There are seven vertebral bodies. And there's no disc degeneration, no evidence of any fracture, and there's no evidence of any disc degeneration. It's a normal study on the cervical spine. I have one other front view.

This primarily is to see between the--what we call the lateral mass and to show the adontoid view. The adontoid's intact and I can see no compression of the lateral masses. So the three films of the neck show no findings and they are normal films.

Q Doctor, is there any loss of curve indicated in any of those cervical x-rays?

A No. The film that would show curvature best is the flexion and extension films. As you can see, there's a good reversal of the curve, there's no sitffness of the neck on bending it forward and bending it backward. It's what

I would call a normal motion study.

Q Doctor, with relation to x-rays, is it possible for a doctor or a technician to position the head and the neck in a certain position so that it would lose its normal curve?

A Yes.

Q That can be done, isn't that true?

A Yes, if you pull the chin in, it will straighten it out.

Q All right, sir, continue, please.

A Now, these are--I will go over these briefly--these are two oblique views of the back which don't show anything significant that I could point out. I will show you more on the front view and the side view. This is the other oblique view.

Of the lumbar spine.

This is a front view of the lumbar spine or the spine from above the belt line to below the belt line. This is your pelvis, you're looking at the x-rays as if you're looking at the back of the patient, this left is on the patient's left. In other words, you're looking at his back so to speak.

There are five lumbar vertebrae. On this film, there's a few little white spots here. What this represents is from the prior myelogram that the patient had, these are a few droplets of Pantopaque. This film doesn't show anything

of significance. He had an exploration of 4, 5, but I can't really pick out too much that--he's had too much bone removed. Probably just a minimal removal of bone.

Q Doctor, by looking at that particular x-ray, are you able to see any defect in the L-4, L-5 area?

A I see a suspiscious area, but I can't be definite. But there probably is one. It looks like there's a little shadow in the outer end of the lamina of L-4 on the right.

Q Sir, that is the operative scene?

A That would be my opinion, yes.

Q All right, sir.

A The side view of the low back, this is with the patient's--front is in this direction, this is his back here. There are, as we said previously, five lumbar vertebrae. 5, 4, 3, 2, 1 is the way we usually count them. His operation was at 4-5. As you progress on downward in the lumbar spine, these white squares represent a side view of the vetebral bodies of the back. And the dark spaces in between are the cushions between the bones and those cushions are your disc and it's this disc that ruptures and that's the thing that you operate to take out.

On a normal x-ray of the lumbar spine, on the side view ordinarily as you progress on down, these disc spaces should be a little larger at each level, and you will note that this

space is a little bigger than this one. This is a little bigger than this one, this is a little bigger than this one. This one is not. This is a littl smaller than this one. Whereas, this one again progresses to a larger. So, I would in my opinion--I think the patient does have some narrowing at L-4-5. Which would be commensurate with removal of the disc at that level.

I don't see any other abnormal findings other than the preexisting Pantopaque from the myelogram.

Q The only abnormal that you see is what?

A Some narrowing, slight narrowing of the L-4-5, intervetebral disc space.

Q Why is that narrowing there, doctor?

A This would be compatable with the patient having an operation and removal of the disc material at the L-4-5 level.

Q In other words, the operation, the removal of the disc causes that narrowing; is that correct?

A That would be my opinion, yes, sir.

Q Thank you.

Now, doctor, having examined him physically and having seen the x-rays and interpreted them, doctor, did you reach an opinion?

A Yes, sir, I did.

Q Doctor, would you be good enough to tell us what your opinion was with relation to this man's condition as it existed in February of 1975?

THE COURT: April, I think he said.

A No, it was February 5, 1975.

THE COURT: February 5th.

A Yes, sir. At the time that I saw him I felt he had reached what medically we term maximum medical improvement. In other words, I would not expect his condition to get much better, I would not expect his condition to get much worse with further treatment or further therapy or operations or anything of that nature.

As far as the neck is concerned, I felt that he had no permanent disability to the neck, secondary to this accident.

As far as the low back was concerned, I did feel that he did have a permanent disability in the low back area amounting to approximately ten percent of the body as a whole. In other words, relating that disability of his back to the body would decrease his function by approximately ten percent.

Q Doctor, with relation to his--this ten percent disability that you stated--

A Yes, sir.

Q Did you reach a conclusion as to whether or not he would be capable of performing any work?

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A Yes. I disqualify myself as an occupational expert, but as far as his activities are concerned, I would recommend that he could do some form of work. In fact, I think this would probably be beneficial to him physically if not mentally. But I would limit him to doing no lifting over thirty pounds. I would not allow him to do any repeated bending or working in a bent over position for any prolonged period of time, say over five or ten minutes. I would not have him do any jobs that would require prolonged periods of walking or standing or prolonged periods of sitting without a break, say every thirty minutes or an hour where if he was sitting he could stand up and walk around, if he was standing, he could sit down.

Q Doctor, with relation to his right foot, did you observe or determine any weakness in and about his right foot?

A No, I could not determine any weakness of the foot. I went over this and checked the musculature and the reflexes to it. I could not determine any weakness in the foot.

Q Doctor, were you able to determine any reason or any necessity for his using a cane?

A No, I couldn't.

Q Is it your opinion, doctor, that he requires a cane or does he not require one?

A I don't see any reason for him to carry a cane. Usually he carries it in the wrong hand.

Q What?

A He carries it in the wrong hand anyway. If your right leg is involved, you carry the cane in your left hand, and you use your bad foot and your cane to walk on at the same time. But I really don't see any reason why he should be carrying a cane. From anything I can determine.

Q All right, sir.

Now, doctor, were you aware of the fact that this man was hypertensive?

A Yes. As I say, I had some medical records on him. and he does have hypertension.

Q Doctor, the hospital records of the Golden Isles Hospital, doctor, indicate--

THE COURT: Exhibit what?

MR. SCHULTZ: Yes, sir. This is Exhibit 6, your Honor.

Excuse me one second, your Honor.

Q (Continuing) --that he has blood pressure of 140 over 104 and that he weighs 260 pounds. Now, doctor, that is a high blood pressure, is it not?

MR. LASSOFF: If your Honor please, may we stop leading the witness.

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Q Is that high blood pressure, doctor?

A That is above normal, yes, sir. That's high blood pressure.

Q Sir, in your examination of this man, did you find him to be obese and over 260 pounds?

MR. LASSOFF: Objection, your Honor, he's already testified that he was slightly--

THE COURT: Wait, wait, wait. This is your witness on direct examination. You may ask him whether a person of the plaintiff's height weighing 260 pounds is obese or not.

MR. SCHULTZ: All right, sir. I will accept that, your Honor.

Q Doctor, a person of six foot two, weighing 260 pounds in this particular plaintiff here, would you classify him as obese?

A Yes, I classified him as slightly obese.

Q Doctor, that condition, combined with the high blood pressure, doctor, do you have an opinion with reasonable medical certainty as to whether or not that will diminish his live expectancy?

A Yes, both of these conditions would have a tendency towards shortening your life span.

MR. SCHULTZ: Excuse me a minute, your Honor.

You may examine, sir.

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THE COURT: I suggest we--how long is your examination going to be?

MR. LASSOFF: A long time, your Honor.

THE COURT: Don't say that. It's not going to be that long.

MR. LASSOFF: I would say about a half hour, at least.

THE COURT: I know you're not going to be finished by one o'clock so we will adjourn.

Return at two o'clock.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(Jury present.)

D U K E B A R N E T T B A I R D, resumed.

CROSS EXAMINATION

BY MR. LASSOFF:

Q Dr. Baird, my client, Mr. Chiarello, came to your office alone in Florida, correct?

A Yes.

Q When he came to your office, did he bring with him certain materials that I had sent with him to give to you?

A Yes, sir.

Q Do you have those materials with you now?

A Most of them. I believe so.

Q May I see what you have, doctor?

A Yes, I think that is all that I have. I don't know if all of this is from you. I think that was separate.

Q That was separate?

A I think that was from your office.

Q Thank you, doctor.

Would it be correct to state, doctor, that this is the entire hospital record at the--

THE COURT: What are you talking about? The reporter and the record will not know what you're asking the doctor about

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unless you identify it.

MR. LASSOFF: I was going to in the next word.

Q Is that a copy of the hospital record of the Golden Isles Hospital in Hollywood, Florida?

MR. SCHULTZ: Objection, your Honor.

THE COURT: What's the exhibit number?

MR. LASSOFF: That's the copy, your Honor.

THE COURT: You put it in the record.

MR. LASSOFF: What he has in his hand is his own copy.

THE COURT: Which is exhibit what on this trial?

MR. LASSOFF: It's Exhibit 6.

THE COURT: What's your objection?

MR. SCHULTZ: If your Honor please, he's asking him is the thing that he holds in this hand, which was given to him by Mr. Lassoff, is that a copy of this hospital record? He'd have to sit there and compare each and every one of them. Mr. Lassoff gave it to him.

THE COURT: You say Mr. Lassoff may have not sent him the correct copy of the record?

MR. SCHULTZ: I don't know, judge. I'm not saying anything. I just don't know and I don't see what probative value it has because he's got the original record that is in evidence here.

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THE COURT: He can show it to him and see if it is the same.

MR. SCHULTZ: He'd have to compare each and every page, judge.

THE COURT: Oh, come on. The doctor's an expert. He goes through hospital records all the time.

Q Doctor, here's the copy of the hospital record that is in evidence. Is that the hospital record that you examined in connection with reviewing the records in this case?

A The one that I have in my hand, yes, sir. That's one of them.

Q Did you yourself also obtain a copy of the hospital record or go to the hospital to see the record, the myelograms and the x-rays?

A At Golden Isles, no, sir.

Q You have never seen the myelograms or--

A I looked at the myelogram here, but I don't think it was that one.

Q The myelogram you looked at here was today?

A Yes, sir. I have not looked at the myelogram at Golden Isles.

Q Prior to examining Mr. Chiarello or after examining Mr. Chiarello, up until today, you have never seen the myelogram

of Mr. Chiarello?

A That's correct.

Q Did you have the operative report with regard to the operation performed by Dr. Gervin on Thomas Chiarello at the time of your examination?

A Yes.

Q Would you tell me what the operative diagnosis was?

MR. SCHULTZ: If your Honor please, I'm going to object. This is not cross examination.

THE COURT: Overruled.

A The operative report on this hospital record?

Q Yes, sir. If you want I can find it for you quickly.

A That's all right.

Operation on 12/5/75, preoperative diagnosis, herniated nucleus pulposis L-4-5, post operative diagnosis the same, and in addition, he put marked epidural adhesions.

Q What are marked epidural adhesions, doctor?

MR. SCHULTZ: If your Honor please, may I respectfully object? This is not cross examination. He's using this doctor to do what Dr. Gervin should be doing.

THE COURT: That's proper cross examination. Objection overruled. First of all, it's in evidence. And second of all, Dr. Kaplan testified about this yesterday; his

doctor. Now he wants to ask your doctor about it.

MR. SCHULTZ: Sir, it's not proper cross.

THE COURT: Proper cross examination.

MR. SCHULTZ: I didn't go into it, sir.

THE COURT: Proper cross examination. It goes to his credibility.

He's not limited exactly to what you went into to attack credibility. Go ahead.

A What was the question again?

Q What are subdural adhesions?

A Epidural adhesions.

Q Epidural.

A These are adhesions about the spinal cord and/or the roots.

Q Is that commonly called scarring?

A Yes, this could be called scarring, also.

Q And is it scarring of the nerve and nerve roots?

A Is what?

Q This epidural adhesions, is that scarring of the nerve at that disc level and nerve roots?

A Yes, sir.

Q Doctor, did you have that hospital record at the time you dictated your report? Did you not?

A Yes.

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Q Can you show me anywhere in your report where you mention epidural adhesions?

A In my report? No.

Q Isn't a finding of epidural adhesions a very serious finding medically?

A Not necessarily. It would depend upon what they're from. If it's a natural development of aging, whether it's a development of surgery, whether it's a development of myelograms. With the adhesions, just having the adhesions as such wouldn't necessarily cause any symptoms.

Q Doctor, you also reviewed Dr. Gervin's reports prior to the operation, the operation report and the post operation report?

A That's right.

Q And it was Dr. Gervin's opinion in the hospital record that these adhesions were as a result of the herniated disc, is that not so?

MR. SCHULTZ: Objection, your Honor.

THE COURT: You mean that's not in the hospital record.

MR. SCHULTZ: Sir, the hospital record, number one, speaks for itself--

THE COURT: That doesn't prevent the examiner from asking the expert witness about what is in the record. I

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thought I clarified that.

MR. SCHULTZ: Sir, he's asking for an opinion of Dr. Gervin. If Dr. Gervin is going to be here in rebuttal, I would have no objection.

THE COURT: I'm sorry, but the record is in evidence for the jury to consider and give it whatever weight it wishes, regardless of whether Dr. Gervin is here or not.

MR. SCHULTZ: If he would read from the hospital record the opinion he's talking about as opposed to Dr. Gervin's reports, I would have no objection.

THE COURT: Dr. Gervin's report is part of the hospital record. It is before this jury.

Q Doctor--

MR. LASSOFF: May I withdraw the question, your Honor?

Q May I have one copy of that record, please?

A Yes.

Q Incidentally, doctor, what is the cause of epidural adhesions?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A The cause could be from various things. Number one, it could just be due to the repeated trauma of everyday living. Number two, it could be due to an actual postoperative

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type of scarring in the region. It could be due to the prior myelograms with the introduction of the Pantopaque into the column.

It could be due to an old infection in the area.

Q How about hemorrhage, doctor?

A It could be due to hemorrhage in the area.

Q What is a hemorrhage, doctor?

A Bleeding.

Q Bleeding in the spinal canal?

A Well, hemorrhage is bleeding. It's not bleeding in the spinal canal.

THE COURT: I don't gather there is any claim of that in this report, that there was bleeding in the spinal canal?

MR. LASSOFF: I believe both Dr. Kaplan and Dr. Friedman testified that the cause of the scarring was bleeding at the disc site, which is inside the spinal column.

THE COURT: He did not testify to that. He testified about the bleeding at the epidural. If you want to bring out where the epidural is, you can do that, if you wish.

Q Where is the epidural adhesion that we referred to?

A Epidural would be inside of the spinal canal.

Q So, in order to get these adhesions in the spinal

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canal, wouldn't the bleeding have to be inside the spinal canal?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

MR. SCHULTZ: It assumes that hemorrhages come only from bleeding in the spinal canal, and he said there are several causes.

THE COURT: But he's asking about this one. It's proper to ask about one of them.

A As I understand your question, there's a scarring in this--could you ask it again?

Q In order to have epidural scarring inside the spinal canal, would there have to be hemorrhaging within the spinal canal?

A If the scarring was from hemorrhaging, yes.

Q Thank you. Doctor, would you read the operative report to the jury?

A Yes. This is an operation 12/5/75, and the operation-

MR. SCHULTZ: If your Honor please, before this, may I respectfully object? This was read by Dr. Kaplan. I didn't go into this on direct.

THE COURT: I have already made my ruling that what you went into on direct is not the only limitation put on cross examining, counsel. He may test this man's credibility

no matter how he wants to test it and he's not limited simply by your questioning. That is fundamental, Mr. Schultz. Your objection is overruled, please proceed.

You now have a continuing objection and the same ruling.

MR. SCHULTZ: All right. Thank you, your Honor.

A The operation is a right hemi-laminectomy with neurolysis and excision of herniated nucleus pulposis L4-5.

The procedure. Do you want me to just read this verbatim all the way through?

Q Yes.

A "The patient was placed under general endotracheal anesthesia and returned to the bolstered prone position with good flexion at the lumbosacral interspace. Skin incision was made from L5-L3 with sharp dissection down to lumbodorsal fascia, then all ligamentus and muscular attachments to the spinous processes and lamina of L3, L4, and L5 were severed from their attachments on the right and retracted on the right with the use of a Taylor retractor.

"Initially the L3-4 interspace was identified and opened but with a negative epidural exploration. X-rays confirmed that we were at L3-4 and our attention then went to L4-5. Yellow ligament was excised. A lamina spreader was placed into the interlamina L4 space and a generous hemi-laminotomy

was performed. There was marked epidural scarring and marked epidural venous engorgement. The veins were cauterized by the use of bipolar cautery. Working carefully under 4-power magnification excised through the scar and were able to identify the L4 nerve and retract it medially. The nerve was scarred to the posterior longitudinal ligament and on mobilizing it the ligament was opened and free disc was bulging through. We continued the mobilization of the L4 nerve root and retracted it carefully. We then performed a disc excision using curets as well as pituitary rongeur and excised approximately 8 cc. of degenerative disc material. We used upgoing pituitary rongeurs as well as the Scoville down-biter to cross over to the left side. Following a good decompression the epidural space was carefully explored to a[illegible]e that there was no free fragment of disc there.

"A generous foraminotomy at L4-5 was then performed. The nerve root was seen to be markedly adherent with scar and frayed. There was a small rent in the dural sleeve and this was closed with a single 4-0 silk suture and overcoated with a pledget of Gelfoam. The wound was irrigated with copious amounts of Bacitracin solution. Closure performed to the deep muscle and lumbodorsal fascia and interrupted 3-0 to the superficial fascia; interrupted 4-0 to the subcutaneous

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tissue; a running 3-0 Ethiflex to the skin. Estimated blood loss 1000 cc. Blood replacement was 500 cc. and the patient was returned to the recovery room in satisfactory condition."

Q Doctor, what is the significance of marked epidural scarring and marked epidural venous engorgement?

A The marked epidural scarring to me would indicate that there was scarring at the level that he was exploring with adhesions to this level. The venous engorgement could be a couple of things. It wouldn't necessarily be due to trauma but it would be due to--it could be due to an infection in that area, which there's no evidence of, or it could be due to the positioning of the patient, some way or another applying pressure to the abdomen when the patient is placed face down; and one of the theories is it raises the entire abdominal blood pressure, which causes engorgement of the nerve roots.

Q Could it also be due to the scarring of the venous engorgement?

A It would be due more to an inflamation than to a scarring.

Q But there was no sign of inflamation?

A That's correct.

Q So there was no inflamation?

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A Not that there is any indication of.

Q In the absence of ithe inflamation, would it be due to the scarring?

A Possibly.

Q Thank you.

Doctor, what does this mean, the nerve root was seen to be markedly adherent with scar and frayed?

A I don't know if he's describing it well. It's hard to interpret. What I would suspect here is that the nerve root was adherent to the surrounding tissues with scar. It may have been frayed from trying to release those adhesions to the scarring and this would also be fortified by the fact that there is a small rent or a tear of the dural sleeves. It would seem that this was--the nerve root was scarred down and that in releasing it and getting it loose, it was--became frayed and that it was torn. The covering was torn.

Q Doctor, would there be any way in the world that a man could have marked epidural scarring and marked epidural venous engorgement with no pain?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A That would be a speculative type of answer. I would imagine that you could have these but I don't see any way you could prove it one way or the other. In other words,

is there anyone walking around without pain that's got epidural scarring engorgement? No way to answer that.

Q Doctor, from your medical experience as a specialist, where you have marked epidural scarring of the spinal canal, isn't that a cause of severe pain and wouldn't you know if you had it?

MR. SCHLUTZ: Objection, your Honor, please.

THE COURT: We'll strike the second part. Wouldn't you know if you had it. I will let the question stand at that point.

A They frequently feel that when you go into operate that there is scarring at that particular level. You don't know if there's scarring above that level or below that level and whether that actually is the cause of the symptomology or not.

MR. LASSOFF: I move to strike the answer.

A I haven't finished.

THE COURT: I won't strike the answer.

MR. LASSOFF: It's not what I asked him.

THE COURT: Certainly it is.

A I haven't finished, either.

Q Okay.

A Most frequently, the cause of the pain at that level and why you are going in has nothing to do with the scarring.

You're going in for a ruptured disc and it's removal of the ruptured disc. The scarring is merely an incidental occurrence which may be caused by the ruptured disc.

Q Doctor, I want you to assume now that we have no accident and we have no ruptured disc and we have a man as far as he knows in perfect health, but he has marked epidural scarring that has never been diagnosed. Would that marked epidural scarring--wouldn't he be aware of pain in the back?

mMR. SCHULTZ: Objection, if your Honor please.

THE COURT: He can't answer it. He said before it's too speculative.

Q In your experience.

A No way I can answer that.

MR. SCHULTZ: Objection, if your Honor please.

Q Now, doctor, these are findings, aren't they, that are in this operative report, surgical findings and a diagnosis?

A Well, they're in this operative report, yes.

Q And they are on a post operative diagnosis?

A Yes.

Q Can you tell me why there is no mention of epidural adhesions or scar tissue or nerve damage in your report?

A I don't see why--what it would be doing in my report.